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No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CESAR ELIAS CRIBAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The issue presented in this petition, which was expressly reserved in *Michigan* v. *Harvey*, 494 U.S. ___, [108 L.Ed.2d 293, 305, 110 S.Ct. 1176] (1990), and is the subject of numerous conflicting state and federal decisions, is whether evidence obtained in violation of the Sixth Amendment right to counsel, as interpreted in *Massiah* v. *United States*, 377 U.S. 201, [12 L.Ed.2d 246, 84 S.Ct. 1199] (1964), may be used for impeachment purposes?

2. Does the admissibility of such evidence for impeachment purposes hinge on a distinction between judicially created prophylactic rules and constitutional guarantees or, instead, on a balancing of the policy behind an exclusionary rule against the policy which demands truth from witnesses?

3. Whether respondent's statements to a prosecuting witness and victim of a crime, obtained in violation of the Sixth Amendment, are admissible for impeachment purposes under circumstances where the traditional standards for evaluating voluntariness and trustworthiness indicate an absence of coercion and duress?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF FACTS	4
Defense	11
STATEMENT OF THE CASE	13
HOW THE FEDERAL QUESTION IS PRESENTED	16
ARGUMENT	19
I. STATEMENTS OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT SHOULD BE ADMISSIBLE FOR IMPEACHMENT PURPOSES	19
A. The Court Of Appeal's Rule Of Admissibility Rests Improperly On Whether The Proffered Statements Were Taken In Violation Of A Prophylactic Rule Or Were Taken In Violation Of The Constitution Simply And Unequivocally.	20

TABLE OF CONTENTS (cont.)

Page

B. There Is A Conflict Between The Lower Courts On This Issue. 29

C. Our System Of Truth And Justice Depends On The Admissibility Of Evidence For Impeachment Unless Exclusion Is Constitutionally Compelled. 32

D. Conclusion. 37

CONCLUSION 39

APPENDICES A-1 - A-18

TABLE OF AUTHORITIES

CASES	Page
Harris v. *New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971)	et passim
Hawthorne v. *United States*, 504 A.2d 580 (D.C. 1986)	33
Maine v. *Moulton*, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985)	34
Market Street Railroad Co. v. *Railroad Commission*, 324 U.S. 548, 89 L.Ed. 1438, 65 S.Ct. 1020 (1945)	3
Martinez v. *United States*, 566 A.2d 1049 (D.C. App. 1989)	30
Massiah v. *United States*, 377 U.S. 201, 12 L.Ed.2d 246, 84 S.Ct. 1199 (1964)	i, 16, 17, 19
Michigan v. *Harvey*, 494 U.S. ___, 108 L.Ed.2d 293, 110 S.Ct. 1176 (1990)	et passim
Michigan v. *Tucker*, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974)	36
Oregon v. *Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed. 570 (1975)	et passim

TABLE OF AUTHORITIES (cont.)

Page

People v. *Bacino*,
41 Ill.App.3d 738,
354 N.E.2d 641 (1976) 30-31

People v. *Cesar Elias Cribas*,
231 Cal.App.3d 596,
282 Cal.Rptr. 538 (1991) 2, 21, 34

People v. *Gonyea*,
421 Mich. 462,
365 N.W.2d 136, (1984) 30

People v. *Ricco*,
56 N.Y.2d 320,
437 N.E.2d 1097, (1982) 30

State v. *Swallow*,
405 N.W.2d 29 (S.D. 1987) 30

State v. *Thomas*, 698 S.W.2d 942
(Mo.Ct.App. 1985) 30

Tate v. *United States*,
109 U.S.App.D.C. 13,
283 F.2d 377 (1960) 31

United States v. *Brown*,
699 F.2d 585 (2d Cir. 1983) 30

United States v. *Calandra*,
414 U.S. 338,
38 L.Ed.2d 561,
94 S.Ct. 613 (1974) 36

United States v. *Frank*,
520 F.2d 1287 (2d Cir. 1975) 30

TABLE OF AUTHORITIES (cont.)

	Page
United States v. *Havens*, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980)	28, 32-33
United States v. *Henry*, 477 U.S. 264, 65 L.Ed.2d 115, 100 S.Ct. 2183 (1980)	34
United States v. *McManaman*, 606 F.2d 919 (10th Cir. 1979)	30
Walder v. *United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954)	et passim

TABLE OF AUTHORITIES (cont.)

	Page
CONSTITUTIONAL PROVISIONS	
United States Constitution	
Fourth Amendment	23, 28, 30
Fifth Amendment	et passim
Sixth Amendment	et passim
Fourteenth Amendment	4
STATUES	
California Penal Code	
§ 137, subd. (a)	13
§ 182	13
§ 261, subd. (2)	13
§ 1538.5	13
Title 28, United States Code	
section 1257(a)	2

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PEOPLE OF THE STATE OF CALIFORNIA,

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v.

CESAR ELIAS CRIBAS,

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the People of the State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division Three, issued on June 21, 1991.

OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division Three is reported at 231 Cal.App.3d 596 and 282 Cal.Rptr. 538 and appears as Appendix A (pages A-1 through A-17.)

The order of the Supreme Court of California denying Petitioner's petition for review is reproduced in Appendix B at page A-18.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, section 1257(a) to review a judgment of the California Court of Appeal, Fourth Appellate District, Division Three which was entered on June 21, 1991. The California Supreme Court denied review in this case on September 26, 1991. The present petition for writ of certiorari is filed

within the required 90-day period following the final entry of judgment. The judgment of the Court of Appeal became final for the purposes of this Court with the denial of review by the California Supreme Court on September 26, 1991. (*Market Street Railroad Co.* v. *Railroad Commission*, 324 U.S. 548, 550-552, [89 L.Ed. 1438, 65 S.Ct. 1020 (1945).) Thus, the instant judgment is a final decision rendered by the highest court of the State of California interpreting rights under the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

> confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Amendment XIV [pertinent part]:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

STATEMENT OF FACTS

In early March of 1989, respondent met Ernesto Rojas and his girlfriend, Luisa B., in the laundry room of their apartment building, where respondent resided. (RT 69-70.) Rojas and Luisa had been living with Rojas' uncle but were

having problems there. Respondent offered to allow them to move into his apartment, stating he would be glad to have help with the rent. (See RT 202.)

Sometime after the two moved into the apartment, respondent made an unsolicited advance toward Luisa while Rojas was away. As Luisa was cooking, respondent approached her, fondled one of her breasts, and put a hand down her pants. (RT 75-77.) Respondent told Luisa not to tell Rojas about the incident. (RT 77.) When Rojas came home, however, Luisa told him what happened. Rojas became angry and threatened to hit respondent, but Luisa talked him out of it by reminding him they would have to move out and had no place to go. (RT 84-85.)[1]

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[1] Apparently the financial situation of Rojas and Luisa was poor. Although Luisa worked and earned money to contribute to the rent and to pay for food, Rojas was looking for work and was unemployed. (RT 73-74; see also, 196, 228.)

The following day, respondent and Rojas were drinking. After a while, respondent gave Rojas some money to buy some liquor and sent him out with the keys to his car. (RT 89-93.) When Rojas left, Luisa got up to go after him but was stopped by respondent. He took her to the couch and began kissing her forcefully. At one point, Luisa managed to break free and ran to the door, but respondent followed her and locked it with the deadbolt. (RT 95-98.) Respondent grabbed Luisa and pushed her down on the floor. (RT 98.) He got on top of Luisa and started to bring her skirt up and to spread her legs. (RT 99-100.) Respondent then got up, raised the volume on the tape recorder, carried Luisa to the bedroom where he bolted the door and forcibly had sexual intercourse with her. (RT 100-109.)

Shortly thereafter, they heard Rojas pounding on the bedroom door. (RT 110.) Respondent immediately got up, which allowed Luisa to break free and unlock the door. She ran into Rojas' arms, crying. (RT 110-111.) Rojas, who was furious, called the police after Luisa told him that respondent had raped her. (See RT 187-188.)

The following day, Luisa received a telephone call from respondent, calling from the jail, urging her to withdraw the charges so that he could get out of jail. He told her his attorney would take care of having the charges dropped. At one point, Luisa put the phone down, and the call was disconnected. (RT 189-191.) Respondent also spoke to Rojas, apologized to him and asked him to forgive him for what had happened. Respondent claimed that he did not know what he was doing, as he had been drinking. (RT 227.)

Later on in the day, Rojas and Luisa were visited by respondent's brother, Danilo Cribas; Rojas spoke to him at that time. Danilo offered Rojas and Luisa $300 if they would help respondent by withdrawing the charges. (RT 192.) Rojas would not agree to anything at that time. (RT 192.) A few days later, Danilo came to the apartment and offered to pay them $500. (RT 194.) At that time, Danilo told Rojas that he should convince Luisa to accept the money. (RT 195.) He also told Rojas that they should tell the police that the day the offense happened Rojas was drunk, that he had hit his girlfriend, and that "she suffers from nervousness." (RT 195.) Rojas said that they would have to pay $5,000. He chose this figure thinking that they would never have that kind of money and would leave them alone. (RT 196.)

After this conversation, Luisa and Rojas went to the police station and reported what respondent and his brother had attempted to do. (RT 116, 196.) Due to the fact that Luisa and Rojas had been evicted, the police got them a motel room. (RT 197.) The police instructed them that, if offered money again, they should accept. (RT 197.) The police also arranged to have a tape recorder attached to the telephone. (RT 198.)[2] When Rojas went to the apartment to get his clothes, he ran into Danilo Cribas. Danilo wanted to know where they were living and wanted their telephone number. (RT 221.) At that time, Rojas told Danilo that Luisa

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[2] At the hearing on respondent's motion to suppress, evidence was presented that police told Luisa to speak with respondent and ask him why he had raped her; this was done in order to obtain respondent's admission so as to bolster the bribery offense which was under investigation. (RT 22, 28.)

wanted to hear from respondent. (RT 221-222.)

Respondent subsequently telephoned and spoke at length with Luisa. He admitted he had raped her and blamed it on the alcohol; he also asked her to withdraw the charges so he could get out of custody.[3] (RT 120; see also, People's Exhibit 6.)

It was not long before Rojas and Luisa received another call from Danilo offering to pay $1,000. (RT 199.) Danilo also made a subsequent call and made arrangements to have the money brought. (RT 199.) Danilo was later arrested when he attempted to complete the transaction. (RT 237-238.) At the time of his arrest, Danilo Cribas had a total of $2,116 on his person. (RT 238.)

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[3] This was the recorded telephone conversation offered for impeachment purposes.

Defense

Respondent testified on his own behalf at trial. (RT 252.) He testified that after Rojas left the liquor store, Luisa approached him while he was in his bedroom making a telephone call. There, she made sexual overtures and he tried to respond, but was unable to achieve an erection. He did not know the bedroom door was locked and believed Luisa locked it. When Rojas began shouting and knocking on the door, Luisa unlocked it and began crying. Respondent denied previously fondling Luisa the day before. (RT 259, 265-270.)

Although respondent admitted calling Rojas and Luisa from the jail and asking if they could help him get out of jail by withdrawing the charges, he claimed that it was Rojas who asked for money. (RT 274-276.) Respondent testified that when he telephoned, Luisa asked him a lot of

questions and he told her what she wanted to hear, in hopes she would withdraw the charges. (RT 286.)

On cross-examination, the prosecutor impeached respondent with his recorded telephone conversation with Luisa where he admitted the rape. (RT 301-302.) The actual tape recording, as well as the transcript of the recording, were also received into evidence for impeachment purposes. (RT 122, 242-243, 313-314; People's Exhibits 2, 3, and 6.)

All of this evidence was offered for the purpose of showing respondent was lying when he testified that he had not raped Luisa, and that, instead, she had made sexual advances to him; this evidence was also offered to show respondent was lying when he testified that he had later admitted the rape to Luisa for the sole purpose of getting her to "drop the charges."

STATEMENT OF THE CASE

In an information filed by the District Attorney of Orange County on June 23, 1989, respondent was charged with one count of forcible rape, in violation of California Penal Code section 261, subdivision (2); one count of bribing witnesses in order to influence their testimony, in violation of California Penal Code section 137, subdivision (a); and one count of conspiring to bribe witnesses, in violation of California Penal Code section 182. (CT 244-246.)[4]

On November 8, 1989, respondent filed a motion, pursuant to California Penal Code section 1538.5, to suppress statements made by him in a taped

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[4] "CT" refers to the Clerk's Transcript of the trial court's documents and orders. "RT" refers to the reporter's transcript of the trial court proceedings. The Clerk's and Reporter's Transcripts were part of the official record before the California Court of Appeal and California Supreme Court.

telephone call as obtained in violation of the Sixth Amendment. (CT 254-460.) Respondent's motion was subsequently denied. (CT 276.)

On November 13, 1989, a jury trial commenced. (CT 268.) Respondent testified at the trial in his defense. The prosecution used respondent's recorded statements to impeach him. (RT 301-302.)

On November 21, 1989, the jury found respondent guilty of forcible rape, bribery of witnesses and conspiracy to bribe witnesses, as charged. (CT 370-371.)

On January 26, 1990, respondent was sentenced to the lower term of three years for his conviction of rape. He received an additional eight months, consecutive, for his conviction of bribing witnesses. The sentence on respondent's conviction for conspiracy was ordered stayed. (CT 381.)

On February 15, 1990, respondent filed a notice of appeal from the judgment. (CT 396-397.)

On June 21, 1991, in a published opinion, the Court of Appeal, Fourth Appellate District, Division Three, affirmed in part and reversed in part. The court reversed respondent's conviction of forcible rape, holding that statements made by him and admitted for impeachment purposes were obtained in violation of the Sixth Amendment to the Constitution; the court ruled evidence obtained in violation of the Sixth Amendment cannot be used for impeachment purposes. (Appendix A.)

On September 26, 1991, the California Supreme Court denied petitioner's petition for review. (Appendix B.)

HOW THE FEDERAL QUESTION IS PRESENTED

In the trial court, respondent moved to suppress evidence of his statements, made in a recorded telephone conversation, on the ground that the statements were obtained in violation of the Sixth Amendment and *Massiah* v. *United States*, *supra*, 377 U.S. at p. 201. The prosecution sought to admit this evidence solely for impeachment purposes. (See CT 276; see also, RT 18, 313.) The trial court denied respondent's motion to suppress and ruled the statements obtained could be used by the prosecution for impeachment purposes. (CT 276; see also, RT 53.)

Respondent subsequently testified at trial in his defense. The prosecution used respondent's recorded statements, wherein respondent made admissions to the victim acknowledging the rape, to impeach respondent's previous inconsistent

testimony to the jury. (RT 252, 301-302; see also, People's Exhibit 6.) Additionally, the prosecution's motion to admit the tape recording and a transcript of the tape recording was granted. (RT 122, 242-243, 313-314.)

In the California Court of Appeal, Fourth Appellate District, Division Three, respondent contended statements he made to the victim were obtained in violation of the Sixth Amendment to the federal Constitution and *Massiah* v. *United States*, *supra*, 377 U.S. 201, and were accordingly improperly admitted. Petitioner argued that respondent's statements were not obtained in violation of the Sixth Amendment and, in any event, the evidence was appropriately admitted. The California Court of Appeal, Fourth Appellate District, Division Three, concluded that respondent's taped telephone statements were indeed taken in

violation of the Sixth Amendment to the United States Constitution and such evidence could not be admitted for any purpose, including for the purpose of impeachment. (Appendix A.)

Petitioner filed a petition for review in the California Supreme Court arguing that the Court of Appeal improperly held as a matter of law that statements obtained in violation of the Sixth Amendment cannot be used for impeachment purposes. Petitioner further argued that under *Michigan* v. *Harvey*, *supra*, 494 U.S. ____, [108 L.Ed.2d 293], respondent's statements could properly be used against him for impeachment purposes, and the exclusionary rule should not bar the use of illegally seized evidence to impeach a criminal defendant. The California Supreme Court denied petitioner's petition for review. (Appendix B.)

ARGUMENT

I.

STATEMENTS OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT SHOULD BE ADMISSIBLE FOR IMPEACHMENT PURPOSES

The issue presented in this case is whether the rationale employed by the Court in *Walder* v. *United States*, 347 U.S. 62, [74 S.Ct. 354, 98 L.Ed. 503] (1954), *Harris* v. *New York*, 401 U.S. 222, [91 S.Ct. 643, 28 L.Ed.2d 1] (1971), and *Oregon* v. *Hass*, 420 U.S. 714, [95 S.Ct. 1215, 43 L.Ed. 570] (1975), applies here, where statements were obtained in violation of respondent's Sixth Amendment right to counsel, as interpreted in *Massiah* v. *United States*, *supra*, 377 U.S. 201. Specifically, the question presented is whether statements obtained in

violation of the Sixth Amendment may be used for impeachment purposes.[5]

A. The Court Of Appeal's Rule Of Admissibility Rests Improperly On Whether The Proffered Statements Were Taken In Violation Of A Prophylactic Rule Or Were Taken In Violation Of The Constitution Simply And Unequivocally.

The California Court of Appeal in this case reversed respondent's rape conviction, holding that respondent's statements were obtained in violation of the Sixth Amendment to the Constitution, simply and unequivocally, rather than in violation of "`only a prophylactic rule,'" relying on its interpretation of this Court's decision in *Michigan* v. *Harvey*, *supra*, 494 U.S. ___, [108 L.Ed.2d 293]. The Court of Appeal held that statements taken in violation of "`only a

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[5] We do not challenge the California Court of Appeal decision finding there was a violation of the Sixth Amendment to the Constitution.

prophylactic rule'" may be used for impeachment purposes, however, statements taken simply and unequivocally in violation of the Constitution cannot be used for any purpose, including for the purpose of impeachment. (*People* v. *Cribas*, *supra*, 231 Cal.App.3d at p. 606.)

The Court of Appeal fashioned a new rule of admissibility contingent on whether evidence is obtained in violation of a *core right* versus a *prophylactic rule*. In so holding, the Court of Appeal has ignored definitive declarations by this Court that a defendant may not "turn the illegal method by which evidence in the Government's possession was obtained to his own advantage and provide himself with a *shield* against contradiction of his untruths." (*Walder* v. *United States*, *supra*, 347 U.S. at p. 65; italics added; *Harris* v. *New York*, *supra*, 401 U.S. at p.

224; see also, *Oregon* v. *Hass*, *supra*, 420 U.S. at pp. 721-723.)

In addition, the Court of Appeal's reliance on a technical distinction between *core* and *prophylactic rule* violations is misguided. The Court's decision in *Michigan* v. *Harvey*, *supra*, 494 U.S. ___, [108 L.Ed.2d 293], never defined the rule of admissibility of evidence for impeachment purposes as hinging on a distinction between a "prophylactic" and "core" violation.

Instead, in evaluating whether illegally obtained evidence may be used to impeach a criminal defendant, this Court has consistently balanced the policy of the exclusionary rule against the policy which demands truth from witnesses in adversary proceedings. (See *Oregon* v. *Hass*, *supra*, 420 U.S. at pp. 721-723; *Harris* v. *New York*, *supra*, 401 U.S. at pp.

224-225; *Walder* v. *United States*, *supra*, 347 U.S. at p. 65.)

Moreover, any reliance on a *core* versus *prophylactic* distinction is belied by the Court's decision in *Walder* v. *United States*, *supra*, 347 U.S. 65, where it was held that a violation of the Fourth Amendment would not preclude the use of evidence seized, via an illegal method, for impeachment purposes. (*Ibid.*) The violation in *Walder* was as "`simply and unequivocally'" (*People* v. *Cribas*, *supra*, 231 Cal.App.3d 606, quoting *People* v. *Harper*, 228 Cal.App.3d 843, 852 [279 Cal.Rptr. 204] (1991)), a violation of the Fourth Amendment as the violation in the instant case was of the Sixth Amendment.

In *Walder* v. *United States*, *supra*, the Court held that evidence obtained in violation of the Fourth Amendment, although not admissible to secure a conviction, could, in fact, be admissible

for impeachment purposes. A defendant may not "affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." (*Id.*, at p. 65.) To allow otherwise, "would be a perversion of the Fourth Amendment." (*Id.*)

Subsequently, in the Fifth Amendment context, the Court in *Harris* v. *New York*, *supra*, 401 U.S. 222, used the same rationale in allowing statements obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), to be used for impeachment purposes, provided of course that the trustworthiness of the evidence satisfied legal standards. (*Id.*, at pp. 224-225.)

> "The shield provided by *Miranda*, *supra*, cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." (*Id.*, at p. 226.)

Such would be a perversion of the Fifth Amendment.

Similarly, the court in *Oregon* v. *Hass*, 420 U.S. 714 [95 S.Ct. 1215, 43 L.Ed. 570] (1975), held that evidence obtained in violation of the Fifth Amendment may be admissible for impeachment purposes. "We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution." (*Id.*, at p. 722.) The Court noted that if the statements sought to be admitted were obtained through government conduct amounting to abuse, such a case, like those involving coercion or duress, could be appropriately measured by "the traditional standards for evaluating voluntariness and trustworthiness." (*Oregon* v. *Hass*, *supra*, 420 U.S. at p. 723.)

Recently, in *Michigan* v. *Harvey*, *supra*, 494 U.S. ___, 108 L.Ed.2d 293, the Court held that a statement to police taken in violation of *Michigan* v. *Jackson*, 475 U.S. 625 [89 L.Ed.2d 631, 106 S.Ct. 1404] (1986), could, in fact, be used to impeach a defendant's testimony. In *Michigan* v. *Jackson*, *supra*, the Court created a bright-line rule for deciding whether an accused who has "asserted" his Sixth Amendment right to counsel has subsequently waived that right. In denying the argument a *Jackson* violation implicates the Sixth Amendment such that a different result was justifiable, the Court stated that "nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney." (*Michigan* v. *Harvey*, *supra*, [108 L.Ed.2d at p. 303].) The Court, once

again, decided that the "'search for truth in a criminal case' outweighs the 'speculative possibility' that exclusion of evidence might deter future violations of rules not compelled directly by the constitution in the first place. [citations omitted]." (*Ibid.*)[6]

The court reiterated:

> "The prosecution must not be allowed to build its case against a criminal defendant with evidence acquired in contravention of constitutional guarantees and their corresponding judicially-created protections. <u>But use of statements so obtained for impeachment purposes is a different matter</u>. If a defendant exercises his right to testify on his own behalf, he assumes a reciprocal 'obligation to speak truthfully and accurately,' [citation omitted], and we have consistently rejected argument that would allow a defendant to

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[6] This Court specifically left open the question of the admissibility for impeachment purposes of a voluntary statement obtained in the absence of a knowing and voluntary waiver of the right to counsel. (*Michigan* v. *Harvey*, *supra*, 494 U.S. ___, [108 L.Ed.2d at p. 305].)

> `"`turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.'"' [Citations omitted]." (*Michigan* v. *Harvey*, *supra*, 494 U.S. ___, [108 L.Ed.2d 293, 302-303]; emphasis added; see also, *Oregon* v. *Hass*, *supra*, 420 U.S. at p. 722; *Walder* v. *United States*, *supra*, 347 U.S. at p. 65; *United States* v. *Havens*, 446 U.S. 620, 626, [100 S.Ct. 1912, 1916-1917, 64 L.Ed.2d 559] (1980).)

The decision by the Court of Appeal, here, narrowly reads *Michigan* v. *Harvey*, *supra*, in order to establish a new rule regarding the admissibility of illegally obtained evidence for impeachment. However, why is a violation of the Sixth Amendment any more compelled ["core"] than a violation of the Fifth or Fourth Amendment? (*Oregon* v. *Hass*, *supra*, 420 U.S. 714; *Harris* v. *New York*, *supra*, 401 U.S. 222; *Walder* v. *United States*, *supra*, 347 U.S. 62.) The Court of Appeal's reliance on distinction between a

violation of a *prophylactic rule* and a violation which is deemed *core* and in a pristine form, finds no support in this Court's prior decisions.

Certiorari should be granted to consider the important federal question left open in *Michigan* v. *Harvey*, *supra*, 494 U.S. ___, [108 L.Ed.2d at p. 305], pertaining to the admissibility for impeachment purposes of statements taken in violation of the Sixth Amendment.

B. There Is A Conflict Between The Lower Courts On This Issue.

Lower courts are divided on whether statements obtained in violation of the Sixth Amendment are admissible for impeachment.

Some state and federal courts which have addressed the issue have taken the approach that a separate set of Sixth Amendment principles should apply that *always* results in suppression of the illegally seized evidence for impeachment.

(See e.g., *United States* v. *Brown*, 699 F.2d 585, 588-591 (2d Cir. 1983); *People* v. *Gonyea*, 421 Mich. 462, 477-483, [365 N.W.2d 136, 143-145] (1984).)

However, there are a number of state and federal courts which have decided that such evidence can in fact be introduced as impeachment evidence, just as evidence obtained in violation of the Fourth and Fifth Amendments can be introduced and for the identical reasons. (See e.g., *Martinez* v. *United States*, 566 A.2d 1049 (D.C. App. 1989); *State* v. *Swallow*, 405 N.W.2d 29, 39-41 (S.D. 1987); *State* v. *Thomas*, 698 S.W.2d 942, 947-949 (Mo.Ct.App. 1985); *People* v. *Ricco*, 56 N.Y.2d 320 [437 N.E.2d 1097, 1100] (1982); *United States* v. *McManaman*, 606 F.2d 919, 924-925 (10th Cir. 1979); *United States* v. *Frank*, 520 F.2d 1287, 1291 (2d Cir. 1975), cert. denied, 423 U.S. 1087 [96 S.Ct. 878, 47 L.Ed.2d 97] (1976). *People* v. *Bacino*,

41 Ill.App.3d 738, 739, [354 N.E.2d 641, 642] (1976); *Tate* v. *United States*, 109 U.S.App.D.C. 13, 15, [283 F.2d 377, 379] (1960).) Each of these cases relied on one or more of the three previously cited Supreme Court decisions: *Walder* v. *United States*, *supra*, 347 U.S. 62, the seminal case on the subject of impeachment with illegally obtained evidence, and that case's two main progeny, *Harris* v. *New York*, *supra*, 401 U.S. 222, and *Oregon* v. *Hass*, *supra*, 420 U.S. 714.[7]

The courts which have admitted such evidence for impeachment purposes have appeared to reach this conclusion after a cautious balancing of two competing policies of the law:

(1) the policy that proscribes, as a prophylactic measure, the use of evidence

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[7] All of these cases, of course, were decided prior to *Michigan* v. *Harvey*, *supra*.

obtained in violation of a rule of law [an exclusionary rule], and

(2) the policy which demands truth from witnesses in the judicial process and which regards an adversary judicial proceeding as a search for truth.

Petitioner submits certiorari should also be granted to resolve the conflict which exists in the lower courts as to the question of whether statements obtained in violation of the Sixth Amendment can be used for impeachment.

C. Our System Of Truth And Justice Depends On The Admissibility Of Evidence For Impeachment Unless Exclusion Is Constitutionally Compelled.

Since the credibility of witnesses is of the utmost importance as a factor in the jury's search for truth, impeachment by a prior inconsistent statement, even one illegally obtained, aids the jury in its truth-seeking function. (See *United States* v. *Havens*, *supra*, 446 U.S. 620,

626-628, 100 S.Ct. at pp. 1916-1917; *Hawthorne* v. *United States*, 504 A.2d 580, 591 (D.C. 1986) ("any unchecked lie is likely to enhance a witness' credibility." ([Citations omitted]; cert. denied, 479 U.S. 992 [107 S.Ct. 593, 93 L.Ed.2d 594] (1986).) Balanced against the tradition of using the adversary process and the jury system as truth-seeking mechanisms is the competing policy of deterring future police misconduct.

Admittedly, police may have little to lose and something to gain by questioning a defendant who has invoked his Sixth Amendment right to counsel. However, as in Fifth Amendment cases, the balance should be struck in favor of admitting impeachment material obtained by such questioning unless the statement was obtained by the use of abusive tactics, coercion, or duress. If statements <u>are</u> obtained by abusive or coercive measures,

then the exclusionary rule and its twin supports, the usual standards for judging the voluntariness and trustworthiness of statements, will be available to take care of the matter. (E.g., *Maine* v. *Moulton*, 474 U.S. 159 [106 S.Ct. 477, 88 L.Ed.2d 481] (1985).)

The Court of Appeal here improperly likens this case with the Government overreaching and manipulation found in *Maine* v. *Moulton*, *supra*, 474 U.S. 159, [88 L.Ed.2d 481, and *United States* v. *Henry*, 477 U.S. 264 [65 L.Ed.2d 115, 100 S.Ct. 2183] (1980). The Court of Appeal accordingly concludes that the rape victim in this case was an "informant." Further, because the victim/witness was receiving a motel room at taxpayer expense, the court finds that she was "a *paid* informant." (*People* v. *Cribas*, *supra*, 231 Cal.App.3d at pp. 603-604, emphasis added.) However, the evidence shows the rape victim in this

case was a Mexican alien who, together with her husband, had no substantial income or housing. (See RT 73, 118, 128.)

Moreover, although the statements here were obtained in violation of the Sixth Amendment, the statements were trustworthy and reliable under the circumstances of this case.

Where the statements are otherwise voluntary and trustworthy, the statements should be admitted for impeachment purposes in order to allow the jury the means of ascertaining the truth. Respondent voluntarily chose to speak to the victim he raped, and he had no reasonable expectation the victim would not attempt to use those statements against him, particularly where those statements were made in the context of bribing and intimidating the victim. Accordingly, he should not be permitted to

subsequently hide behind the Sixth Amendment to commit perjury.

The "shield" provided by the Sixth Amendment should not be perverted into a "sword" to commit perjury. (See *Walder* v. *United States*, *supra*, 347 U.S. at p. 65; *Harris* v. *New York*, *supra*, 401 U.S. at pp. 224-225; and *Oregon* v. *Hass*, *supra*, 420 U.S. at pp. 721-722.)

The exclusionary rule serves the entirely valid and useful purpose of preventing, but not repairing, police conduct that results in a constitutional violation. (See *Michigan* v. *Tucker*, 417 U.S. 433, 446, [94 S.Ct. 2357, 2364, 41 L.Ed.2d 182] (1974); *United States* v. *Calandra*, 414 U.S. 338, 347 [38 L.Ed.2d 561, 94 S.Ct. 613, 619] (1974).) However, the policy that proscribes, as a prophylactic measure, the use of evidence obtained in violation of an exclusionary

rule must be balanced against the policy that demands truth from witnesses.

D. Conclusion.

The decision by the Court of Appeal misconstrues this Court's decision in *Michigan* v. *Harvey*, *supra*, and has adopted a new rule of exclusion of evidence for impeachment purposes that is inconsistent with the Court's rationale stated in *Walder*, *Harris* and *Hass*, *supra*. This rule will permit a defendant to lie with immunity in the face of illegally obtained, and previously made, inconsistent statements by him, committing perjury in the name of the Sixth Amendment.

If a defendant elects to testify on his own behalf, he must speak truthfully and accurately and the prosecution should and must be able to confront him with any inconsistent statements in order to preserve the truth-seeking process. The

"shield" provided by the exclusionary rule should not be "perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." (*Harris* v. *New York*, *supra*, 401 U.S. at pp. 222, 226.)

In conclusion, petitioner submits the Sixth Amendment should not sanction perjury in the name of the Constitution and respectfully requests this Court settle this important federal question.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the writ of certiorari should issue to review the decision of the California Court of Appeal in this case.

Dated: November 7, 1991.

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[No. G009230. Fourth Dist., Div. Three. June 21, 1991.]

THE PEOPLE, Plaintiff and Respondent, v.
CESAR ELIAS CRIBAS, Defendant and Appellant.

SUMMARY

A jury convicted defendant of rape (Pen. Code, § 261, subd. (2)), bribery of witnesses (Pen. Code, § 137, subd. (a)), and conspiring to bribe witnesses (Pen. Code, § 182). After defendant had been arrested, defendant's brother had offered the alleged rape victim and her boyfriend money if she withdrew the charges. Although defendant had asserted his right to counsel, the victim taped a telephone conversation with defendant upon the instruction of police officers. In the conversation, defendant admitted responsibility for the rape and requested the victim to withdraw the charges. The trial court denied defendant's motion to suppress the portion of the conversation relating to the rape, ruling that the statements were admissible for impeachment purposes. (Superior Court of Orange County, No. C-74030, Richard J. Beacom, Judge.)

The Court of Appeal reversed the rape conviction, remanded for resentencing on the bribery and conspiracy convictions, and in all other respects affirmed the judgment. It held that the taped conversation was obtained in violation of defendant's right to counsel, since he had previously invoked that right and the victim was working under the direction of police officers. Thus the statements regarding the rape were inadmissible for any purpose. It also held that there was substantial evidence to support the conviction of bribery of witnesses, notwithstanding that the evidence indicated defendant merely asked the victim to "drop the charges," since the brother's statements, attributable to defendant as a coconspirator, indicated a scheme in which the victim was to fabricate a story. (Opinion by Sonenshine, Acting P. J., with Crosby and Wallin, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a-1d) Criminal Law § 117—Interrogation; Advice as to Constitutional Rights—Victim's Obtainment of Defendant's Incriminating

Statements Upon Instruction of Police.—In a prosecution for rape and bribery of witnesses, the trial court erred in admitting, for impeachment, defendant's acknowledgment that he committed the rape, obtained in a recorded telephone conversation with the victim. Police officers were investigating the rape and the attempts of defendant and his brother to bribe the victim into withdrawing the charges. Defendant had invoked his constitutional rights upon his arrest, but the officers paid for a motel room for the victim and instructed her to give defendant her telephone number, so that he could call her from jail, and to record the conversation. Since the victim was acting at the behest of the officers and with motivation to assist them, and since the victim elicited defendant's incriminating statements, the statements were obtained in violation of defendant's right to counsel. Thus, the statements were inadmissible for any purpose. Further, although the statements were admitted only for impeachment, the error was reversible, since the references to the rape made the conviction for that offense more likely.

[See Cal.Jur.3d (Rev), Criminal Law, §§ 2193, 2194; 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) § 2695.]

(1) Criminal Law § 77—Rights of Accused—Aid of Counsel—Government Interrogation in Violation of Right.— The U.S. Const., 6th Amend., guaranty of right to counsel includes the state's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. Knowing exploitation by the state of an opportunity to confront the accused without counsel being present is as much a breach of the state's obligation not to circumvent the right to assistance of counsel as is the intentional creating of such an opportunity.

(2) Criminal Law § 128—Interrogation; Advice as to Constitutional Rights—Waiver of Rights—Effect of Voluntariness of Statement.— Voluntariness is the sine qua non in a challenge to the admissibility of defendant's statement under U.S. Const., 5th Amend. (privilege against self-incrimination), because there is no Fifth Amendment violation where statements are voluntary. But a purportedly voluntary statement violates U.S. Const., 6th Amend. (right to counsel), if it is secured after defendant has asserted the right to counsel and without any waiver of that right. Accordingly, in Sixth Amendment cases the question of voluntariness is not dispositive. Thus, in both Fifth and Sixth Amendment cases, the determinative factor is not whether the statements were voluntary or involuntary, but whether they were or were not obtained in violation of the Constitution.

(4) Rape § 2—Defenses—Intoxication.—Rape is a general intent crime, and intoxication is not a defense unless it rises to the level of unconsciousness.

(5) Bribery § 5—Prosecutions—Evidence—Bribing Witness—Requesting Victim to Withdraw Charges.—In a prosecution for bribery of a witness and conspiracy to bribe a witness (Pen. Code, §§ 137, subd. (a), 182), there was substantial evidence to sustain a conviction for violation of § 137, subd. (a). Although the evidence indicated that defendant did nothing more than ask a rape victim to "drop the charges" against him, there was other evidence supporting the conviction, including the delivery by defendant's brother of money to the victim and her boyfriend, and the brother's statements that he had suggested to the victim and her boyfriend that they fabricate a story. Since defendant and his brother were coconspirators, the brother's statements were attributable to defendant for purposes of the substantive offense.

[Validity, construction, and application of state statutes imposing criminal penalties for influencing, intimidating, or tampering with witness, note, 8 A.L.R.4th 769.]

(6) Bribery § 5—Prosecutions—Bribing Witness—Effect of Reversal of Conviction of Underlying Crime.—On appeal of a conviction of rape and bribing a witness (Pen. Code, §§ 261, subd. (2), 137, subd. (a)), reversal of the rape conviction did not require reversal of the bribery conviction. The gravamen of the offense proscribed by § 137, subd. (a) is the influencing of information given by someone who is or will be involved in legal proceedings. Whether the witness's original accusation is actually true is irrelevant, as is the result of the legal proceeding and whether the witness intends to carry out the agreement to testify falsely. Indeed, the underlying crime need not be prosecuted or even to have been committed at all.

(7) Conspiracy § 11—Criminal—Jury Instructions—Overt Act Underlying Conspiracy.—In a prosecution for conspiracy to bribe witnesses, the trial court's jury instructions regarding overt acts supporting underlying conspiracy were adequate. The trial court need not specifically instruct the jury they must unanimously agree as to the overt act done in pursuance of the conspiracy. It is only necessary that the jury agree that defendant committed some overt act in furtherance of the conspiracy. CALJIC Nos. 6.10 and 17.50 adequately apprised the jury of its duty. CALJIC No. 6.10 told the jury the proof of a conspiracy requires proof of at least one overt act. CALJIC No. 17.50 advised that all 12 jurors had to agree on a decision as to any findings in their

verdict. These most specific instructions must be viewed in conjunction with the unqualified requirement that proof be made beyond a reasonable doubt as to each element of an offense and that the verdict be unanimous.

COUNSEL

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OPINION

SONENSHINE, Acting P. J.—Cesar Elias Cribas was convicted by a jury of rape (Pen. Code, § 261, subd. (2)),[1] bribery of witnesses (§ 137, subd. (a)), and conspiring with his brother, Danilo, to bribe witnesses (§ 182). He asserts a tape-recorded conversation between him and the victim was admitted in violation of the mandates of the United States Supreme Court in *Massiah* v. *United States* (1964) 377 U.S. 201 [12 L.Ed.2d 246, 84 S.Ct. 1199], and contained statements which were involuntary. He also challenges the sufficiency of the evidence to support the bribery-related convictions.

I

In March 1989, Cribas met Ernesto Rojas and his girlfriend, Luisa B., in the laundry room of the apartment complex where Cribas resided. Rojas and Luisa had been living with Rojas's uncle, but were having problems there. Cribas offered to allow them to move into his apartment, stating he would be glad to have help with the rent.

Sometime after the two moved into the apartment, Cribas made an unsolicited advance toward Luisa while Rojas was away. As Luisa was cooking, Cribas approached her, fondled one of her breasts, and put a hand down her

[1] All statutory references are to the Penal Code unless otherwise specified.

A-4

pants. She became upset and told him to leave her alone. He did so and, when Rojas came home, Luisa told him what had happened. Rojas became angry and threatened to hit Cribas, but Luisa talked him out of it by pointing out they would have to move out and had no place to go.

On the following day, Cribas and Rojas were drinking. After a while, Cribas gave Rojas some money and the keys to his car and sent him out to buy some liquor. When Rojas left the apartment, Luisa started to follow but was stopped by Cribas. He took her to the couch and began kissing her forcefully. At one point, Luisa managed to break free and ran to the door, but Cribas followed her and locked it with the deadbolt.

Cribas forced Luisa onto the floor and began raising her skirt and spreading her legs. He then got up and carried Luisa into the bedroom, where he bolted the door and forcibly had intercourse with her. They then heard Rojas pounding on the bedroom door. Luisa broke free and unlocked the door, running into Rojas's arms, crying. Rojas called the police, who arrested Cribas and took Luisa to a clinic.

The next day, April 2, Cribas telephoned Luisa at the apartment and urged her to withdraw the charges so that he could get out of jail. He told her his attorney would take care of having the charges dropped. At this point, the connection was accidentally cut off. She could not remember whether Cribas offered to give her some money during this conversation.

That evening, Cribas's brother, Danilo, came to see Luisa and Rojas and asked them to help Cribas by withdrawing the charges, offering them $300. A few days later, he returned and offered them $500. Rojas told Danilo they would possibly help for $5,000. Rojas testified he tossed out that figure because he wanted to get rid of Danilo and knew he would never be able to raise that much money.

The following day, Rojas and Luisa were evicted from the apartment. They told the police about the telephone call from Cribas and the visits from Danilo. The police obtained a motel room for them and connected a tape recorder to the telephone. Police Officer Allen Caddell instructed them to give Danilo their new telephone number and to tell him to have Cribas call from jail. He also instructed them to accept any money offered by Cribas or Danilo. He told Luisa to speak with Cribas and ask him why he had raped her, in order to obtain his admission that he had indeed done so and to bolster the evidence of the bribery offense.

Cribas called on April 8 and first spoke with Rojas, telling him he was sorry. He said he had been drinking and did not know what he was doing.

A-5

Cribas also spoke at length with Luisa.[3] He responded to her questioning by admitting he had raped her and pleading with her to withdraw the charges she had leveled, so that he could get out of jail. Luisa then asked him for

[3]The relevant portions of the taped conversation were transcribed as follows:
"L.B.: Huh? (What?)
"C.C.: My brother told me you wanted to talk to me.
"L.B.: Yes.
"C.C.: Uh, huh (Affirmative)
"L.B.: Look, Cesar.
"C.C.: Huh, huh (Affirmative)
"L.B.: If you answer these questions . . .
"C.C.: Uh, huh (Affirmative)
"L.B.: It is possible that I may be able to help you.
"C.C.: Yes, but as I told you, I want to, I want to help you right now, but, but, when I get out then I will. In here how can I be of help to you?
"L.B.: Huh? (What?)
"C.C.: While I am in here how can I help you? I can't help you in here and in whatever you need me for. I am here serving some time. But, I don't know what you want . . . or, what is the question you wanted to ask me?
"L.B.: They are questions. It is not only one question.
"C.C.: Uh, huh (Affirmative) Okay.
"L.B.: Look, I want to know why you raped me. What was your reason.
"C.C.: Huh? (What?)
"L.B.: I want to know why you raped me. What was your reason?
"C.C.: To tell you the truth, I cannot tell you, because, because when one is drunk, one does not know what he is doing, right?
"L.B.: You don't know what you did?
"C.C.: Uh, huh (Affirmative)
"L.B.: But, you did it.
"C.C.: Yes, that is why I'm telling you because when one is very drunk one does not know what he is doing. Since Friday, I was drinking and INAUDIBLE
"L.B.: But you do admit that you did it?
"C.C.: Huh? (What?)
"L.B.: You do accept the fact that you did rape me?
"C.C.: Uh, huh (Affirmative) Well, I accept it.
"L.B.: Okay. The other one.
"C.C.: Uh, huh (Affirmative)
"L.B.: I think that my neighbors found out that I was crying. There are witnesses.
"C.C.: Uh, huh (Affirmative) INAUDIBLE
"L.B.: The last one.
"C.C.: Uh, huh (Affirmative)
"L.B.: Did you enjoy doing what you did to me?
"C.C.: Oh, well, I don't know. INAUDIBLE
"L.B.: What?
"C.C.: No, no, no, I don't think it was right.
"L.B.: You did not think it was right what you did?
"C.C.: No . . . INAUDIBLE Uh, uh (No)
"L.B.: Yes, because my husband is upset.
"C.C.: Yes, I know. I would also be upset. INAUDIBLE
"L.B.: Can you imagine: [sic] how I feel knowing that you forced me? Answer me.
"C.C.: Yes, I can imagine how you feel. Certainly. It's true. When one is drunk one does not know.
"L.B.: No, now you don't know, but you did do it."

money, which he claimed he did not have and could not get as long as he was in custody. The contents of the conversation were recorded and a transcription of the portion relating to the bribery was admitted into evidence.

Later, Luisa and Rojas received a call from Danilo, which they also recorded, asking if they had spoken with Cribas and offering them money. In another call, they settled on an amount with Danilo, and he was arrested when he went to their motel to deliver it.

At trial, Cribas testified that after Rojas left to buy the liquor, Luisa approached him while he was in his bedroom making a telephone call. She made sexual overtures and he tried to respond, but was unable to achieve an erection. He did not know the bedroom door was locked and believed Luisa locked it. When Rojas began shouting and knocking on the door, Luisa unlocked it and began crying. Cribas also denied touching Luisa the day before.

Following his arrest, Danilo told Cribas he was going to speak to a lawyer about getting Luisa to drop the charges. He told Cribas Luisa wanted to talk to him before she would agree to help, and gave him her number. When Cribas called, Luisa asked him a lot of questions. He told her what she wanted to hear, in hopes of convincing her to withdraw the charges. On cross-examination, the prosecutor questioned Cribas extensively on the portion of the recorded telephone conversation containing admissions to the rape.

II

Cribas moved to suppress the portion of the recorded statements elicited in the telephone conversation with Luisa relating to the rape, on the ground they violated his Sixth Amendment right to counsel. It was stipulated that, at the time of the taped telephone conversation, counsel had been appointed to represent Cribas. The court denied the motion and ruled the statements could be used to impeach Cribas's testimony.

(1a) Cribas's primary contention on appeal is that Luisa was acting as an agent of the police and conducting an interrogation at the behest of Officer Caddell. Because he had an attorney at the time and he had invoked his *Miranda*[1] rights when the police attempted to question him, he asserts this government action interfered with his Sixth Amendment right to counsel.

[1] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed. 694, 86 S.Ct. 1602, 10 A.L.R.3d 974].

A-7

The Attorney General responds that Luisa was not a government agent and Cribas waived his rights when he initiated the telephone call; further, the police action in recording the call was designed to investigate a new crime, i.e., the bribery of a witness.

Cribas's argument is founded upon a line of United States Supreme Court decisions interpreting the Sixth Amendment, beginning with *Massiah* v. *United States*, *supra*, 377 U.S. 201. The *Massiah* court held that postindictment communication with an accused, deliberately elicited by a codefendant acting as an agent of the government, interferes with the right to counsel. (*Id.* at p. 206 [12 L.Ed.2d at p. 250].) Applying this rule in *United States* v. *Henry* (1980) 447 U.S. 264 [65 L.Ed.2d 115, 100 S.Ct. 2183], the court found the government had violated Henry's right to counsel when it deliberately elicited statements through a paid informer who was an inmate at the same jail. Even though the informer had been instructed by the government not to initiate any conversation or ask any questions, he had engaged Henry in conversation certain to evoke incriminating statements.

Three factors were highlighted in *Henry*: The informer was acting under instructions from the government; he was ostensibly no more than a fellow inmate; and Henry was in custody at the time. (*Id.* at p. 270 [65 L.Ed.2d at p. 123].) The court observed that informers generally have an incentive to produce useful information for the government. And, they can take the defendant unawares because the defendant may say things which he or she would not intentionally reveal to government agents. Moreover, there is a "powerful psychological inducement to reach for aid when a person is in confinement. [Citations.] . . . [T]he mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents." (*Id.* at pp. 270-274 [65 L.Ed.2d at p. 124].)

These principles were carried a step further in *Maine* v. *Moulton* (1985) 474 U.S. 159 [88 L.Ed.2d 481, 106 S.Ct. 477], where the represented defendant initiated a telephone conversation with a codefendant who, unbeknown to Moulton, was cooperating with the state. A meeting was arranged in order to discuss their trial strategy, at which their conversation was recorded. The state maintained there was no interference with the right to counsel, because Moulton had initiated the telephone call and the meeting. The Supreme Court rejected such a distinction, pointing out "the identity of the party who instigated the meeting at which the Government obtained incriminating statements was not decisive or even important to our decisions in *Massiah* or *Henry*." (*Id.* at p. 174 [88 L.Ed.2d at p. 495].)

(2) The court explained that the Sixth Amendment guarantee "includes the State's affirmative obligation not to act in a manner that circumvents the

A-8

protections accorded the accused by invoking this right. . . . [K]nowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to assistance of counsel as is the intentional creating of such an opportunity." (*Id.* at p. 176 [88 L.Ed.2d at p. 496].)

(1b) The prosecution had also asserted the statements were admissible because the police had other, legitimate reasons for recording the conversation: The officers wanted to protect the informer's safety in case Moulton found out he was cooperating with them, and they were attempting to gather information about a new offense he was contemplating. The court held these legitimate interests did not justify the use of unlawfully obtained statements at the trial of those charges for which Moulton was represented by counsel. There was no bar, however, to their use in a trial of the new offense. (*Id.* at p. 180 [88 L.Ed.2d at p. 498].)

In *Kuhlmann* v. *Wilson* (1986) 477 U.S. 436 [91 L.Ed.2d 364, 106 S.Ct. 2616], the high court drew the line at statements which were not elicited, but which were overheard by a paid informant placed in the defendant's cell and told to report any incriminating statements. The so-called "listening post" situation marked the first departure from the policy that "the courts must focus on the state's conduct as a whole, rather than on the informant's." (*People* v. *Whitt* (1984) 36 Cal.3d 724, 741 [205 Cal.Rptr. 810, 685 P.2d 1161].)[4]

With this background, we turn to the facts of the case before us. It is undisputed that Luisa was acting at the behest and encouragement of Officer Caddell to assist him in gathering additional evidence. And, to the extent she was receiving a motel room at taxpayer expense, she was also a paid informant. Indeed, she and Rojas were apparently desperate for a place to live. At oral argument, the Attorney General posited that the consideration they received was not a motivating factor in their cooperation. We disagree. Moreover, it can hardly be claimed that a person claiming to be a victim of a violent crime has no motivation to assist police in gathering evidence to corroborate her allegations. Luisa quite clearly had several incentives to produce useful information.

[4] *Whitt* was decided prior to *Kuhlmann* and focuses on whether the informer is acting at the behest of the police or on his or her own initiative. Whether the informer was just listening or questioning the defendant was found irrelevant in Whitt. (*People* v. *Whitt*, *supra*, 36 Cal.3d at p. 742.) This is in sharp contrast to *Kuhlmann*, where the police did place the informer in an opportune position, but the informer did nothing but listen. However, the portion of *Kuhlmann* which addresses this issue was not necessary to that decision. It primarily concerned the propriety of the court of appeals entertaining a petition for habeas corpus from the prisoner. The Supreme Court found the lower court had acted improperly; it then stated that even if it correctly entertained the petition, it erred in granting *Massiah/Henry* relief.

A-9

Turning to the other factors, Cribas, who had no knowledge he was speaking indirectly to the police, had already asserted his right not to incriminate himself. And, of course, he was in custody at the time of the call. Reviewing the substance of the call, Luisa was undeniably eliciting responses and was not simply a passive listener.

The Attorney General contends Cribas initiated the interrogation by voluntarily placing the telephone call.[9] But the same was alleged of the defendant in *Moulton*, who made an unsolicited call, which was recorded, to his codefendant and arranged a meeting. The court found the question of who initiated the call was irrelevant. (*Maine* v. *Moulton*, *supra*, 474 U.S. at pp. 174-175 [88 L.Ed.2d at p. 495].) "It is [] irrelevant to the *Henry* analysis that an accused's statements were voluntarily made. 'Since "coercion" is not a Sixth Amendment question, "voluntariness" simply plays no part in the test of admissibility.' [Citation.]" (*People* v. *Whitt*, *supra*, 36 Cal.3d at p. 742.)

And, it cannot candidly be asserted that Cribas voluntarily initiated the call. Cribas had placed one unsolicited phone call the day after the rape during which he did no more than beg Luisa to withdraw the charges. Thereafter, his brother handled the matter. Through him, Rojas and Luisa continually held out hope to Cribas that she would help him. Luisa, at Caddell's insistence, told Danilo to give Cribas her new phone number and have him call her. This was phrased as a condition precedent to any further discussion of her dropping the charges.

As pointed out in *Henry*, an incarcerated defendant is especially vulnerable to such incentives. The police used Cribas's desperation as a means of circumventing his right to have counsel present at any questioning, a right he had asserted immediately upon his arrest. Thus, even if an initiation argument were available in this context, we would reject it.

In every sense, the police deliberately created the setting and led Cribas into it. Surreptitious questioning was conducted at their request about a matter on which counsel had been appointed.

Next, the Attorney General argues the police were investigating a new crime and were therefore not interfering with the right to counsel for the offense on which Cribas was represented. We would readily agree if it were

[9]The Attorney General's reliance on *Edwards* v. *Arizona* (1981) 451 U.S. 477 [68 L.Ed.2d 378, 101 S.Ct. 1880] is misplaced. The *Edwards* court held an accused who has invoked *Miranda* rights may not be questioned unless a further conversation is initiated by the accused and there is another admonishment. It is based on the Fifth Amendment, which is not at issue here.

A-10

not for the fact Caddell specifically instructed Luisa to obtain an admission from Cribas that he had raped her. Caddell testified one of his purposes was to obtain corroboration of *the rape*. Defense counsel's motion in the lower court was directed only at the first portion of the phone call, which contained damaging admissions about the rape; no effort was made to challenge the latter half, in which Cribas negotiated with Luisa for his release. The portion concerned with the admission of rape could readily have been excised without threatening the evidence of the new crime. In fact, during the trial, only the portion of the tape relating to the bribery charge was admitted in the prosecution's case in chief; the remainder was introduced only as impeachment of Cribas's testimony.

Thus, we must determine whether statements obtained in violation of *Massiah* may be used to impeach the testimony of a defendant. In *People* v. *Harper* (1991) 228 Cal.App.3d 843 [279 Cal.Rptr. 204], the court concluded they could not, distinguishing the recent United States Supreme Court decision in *Michigan* v. *Harvey* (1990) 494 U.S. 344 [108 L.Ed.2d 293, 110 S.Ct. 1176]. The *Harper* court summarized *Harvey* as holding that "a statement taken in violation of 'only a prophylactic rule' may be used for impeachment purposes. It does not, however, follow that a statement taken in violation of the Constitution may be used for impeachment purposes." (*Harper, supra*, at p. 851.) The court agreed that violations of prophylactic rules designed to ensure knowing and intelligent waivers were not a bar to use of illegally obtained statements for impeachment where the problem is an *imperfect* waiver. However, it found these rules have "little application where there is no question of waiver. The statement, taken after appellant was indicted, and without any waiver of his right to counsel, simply and unequivocally violated the Sixth Amendment." (*Id.* at p. 852.)

Nor is the fact the statements were otherwise voluntary dispositive. (3) Voluntariness is the sine qua non in a Fifth Amendment challenge because there is no Fifth Amendment violation where statements are voluntary. But "[a] purportedly voluntary statement violates the Sixth Amendment if it is secured after a defendant has asserted the right to counsel and without any waiver of that right. Accordingly, in Sixth Amendment cases the question of voluntariness is not dispositive." (*Id.* at p. 853.) Thus, in both Fifth and Sixth Amendment cases, the determinative factor is not whether the statements were voluntary or involuntary, but whether they were or were not obtained in violation of the constitution. We have already determined the statements in this case were.

(1c) In determining whether Cribas was prejudiced by the admission of evidence obtained from a *Massiah* violation, the harmless error test of *Chapman* v. *California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824, 24

A.L.R.3d 1065] applies. (*Milton* v. *Wainwright* (1972) 407 U.S. 371, 372 [33 L.Ed.2d 1, 3-4, 92 S.Ct. 2174].) As is typical in rape cases, the evidence consisted primarily of testimony by the accused and the victim. The statements made by Cribas during the telephone conversation acknowledged culpability, but tempered the admission with remarks that he was drunk and did not know what he was doing:

"L.B.: You don't know what you did?

"C.C.: Uh, huh (Affirmative)

"L.B.: But, you did it.

"C.C.: Yes, that is why I'm telling you because when one is very drunk one does not know what he is doing. Since Friday, I was drinking and

INAUDIBLE

"L.B.: But you do admit that you did it?

"C.C.: Huh? (What?)

"L.B.: You do accept the fact that you did rape me?

"C.C.: Uh, huh (Affirmative) Well, I accept it."

The admission that he raped Luisa and accepted responsibility for it are no less damaging because of his drinking. (4) Rape is a general intent crime, and intoxication is not a defense unless it rises to the level of unconsciousness. (1d) And, Cribas tendered an apology to Rojas for his conduct during his first phone call. That statement, which contained similar incriminating material, was properly before the jury. However, this was readily explained in the context of Cribas's defense that Rojas and Luisa were lying because they had set him up in an attempt to extort him.

While counsel gamely argued the recorded statements were made in order to tell Luisa whatever she wanted to hear, there is no denying that a recorded statement containing his concession of guilt was damaging to his defense. Moreover, this is not a case where other physical or testimonial evidence combined to produce an overwhelming case.

Looking at the conduct of the jury, it did not arrive at its verdicts until after deliberating for approximately nine hours over a two-day period. During that time, it requested rereading of Luisa's testimony regarding the day

A-12

of the rape and sought guidance on the conspiracy instruction. The entire trial, even though conducted through interpreters, lasted only slightly more than two days. Apparently, the jury did not view its decision as clear cut. We cannot say beyond a reasonable doubt that the jury would have reached the same verdict on the rape count in the absence of these admissions.

Thus, upon retrial, the prosecution may not use Cribas's statements relating to the rape, which we quote in footnote 2, *ante*, against him in any manner.[6]

III

(5) Cribas contends there is no evidence supporting the jury's conclusion he committed an act specified within section 137, subdivision (a), which provides that any person who "gives or offers, or promises to give, to any witness, person about to be called as a witness, or person about to give material information pertaining to a crime to a law enforcement official, any bribe, upon any understanding or agreement that the testimony of such witness or information given by such person shall be thereby influenced is guilty of a felony." The information alleged Cribas offered money to Rojas and Luisa to influence their testimony or the information they provided to the police.

Cribas asserts the evidence established he did nothing more than ask Luisa to drop the charges. The Attorney General does not appear to contest this characterization of the evidence, but argues it "would be ludicrous to conclude that an agreement to get the witness 'to drop' a case does not reasonably mean 'to influence a witness not to testify.'" He points out because Luisa did not have the authority to dismiss the case, the only way she could drop the charges was by refusing to testify. However, he points to no evidence Cribas knew that.

Cribas cites *Lichens* v. *Superior Court* (1960) 181 Cal.App.2d 573 [5 Cal.Rptr. 539] which, as he asserts, is strikingly similar to the instant case. Lichens had repeatedly offered to pay his attempted rape victim $500 to "drop the case." He was charged with bribery of a witness under former section 136 1/2 (amended and renumbered as § 138).[7] The appellate court

[6]We therefore need not reach Cribas's argument, that the statements to Luisa were involuntary. That issue is directed to the same portion of the recorded conversation. Similarly, we do not reach Cribas's contention that the court erred in denying his request to instruct the jury to disregard the same statements if it found them the product of coercion.

[7]The only apparent difference between section 138, subdivision (a) and section 137, subdivision (a) is the former prohibits bribing "upon any understanding or agreement that the person shall not attend upon any trial or other judicial proceeding," or attempting to dissuade such attendance. Section 137, subdivision (a) prohibits giving or offering to give a bribe under

A-13

issued a writ of prohibition, observing that using money to induce the victim to "drop the charge" was not unlawful because only the district attorney could consent to a dismissal. Moreover, it was not the equivalent of inducing her not to attend the trial. (*Id.* at p. 576.)

The Attorney General relies on *People* v. *Pic'l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685, 646 P.2d 847]. In *Pic'l*, the defendant drafted a document in which the victim agreed to "'seek dismissal of all criminal charges which may have been filed . . . and to do everything within my power to prevent the filing of any additional charges against any person.'" He also agreed to "'refuse to prosecute criminal charges against anyone.'" The Supreme Court held it was reasonable for the grand jury to have concluded that non-attendance was within the scope of the agreement "to 'do everything within my power'" and his agreeing to "'refuse to prosecute'" reasonably contemplated refusing to testify. (*Id.* at p. 740.)

While not directly disapproving *Lichens*, *supra*, 181 Cal.App.2d 573,[5] the court distinguished it by noting the victim in *Pic'l* had a greater burden in fulfilling his agreement: "he had to '*refuse* to prosecute' and 'do *everything*' to prevent further charges. Absenting himself from trial would have been an obvious means of keeping the bargain." (*Id.* at p. 741.) The court concluded an indictment under former section 136 1/2 "may be supported by an inference, based on the defendant's words or actions, that he has violated the statute; no express statement by the defendant of his intent to prevent the witness' testimony is required." (*Ibid.*)

Applying these principles, the instant case more closely resembles the facts in *Lichens*. Here, too, Cribas did no more than ask Luisa to drop the charges. She testified that during their first telephone conversation, he said he could not continue to help them while in jail and that his attorney would handle having the charges dropped. In their recorded telephone conversation, Cribas again asked Luisa repeatedly to help him get out of jail and once referred to her dropping the charges, but insisted he did not have the money she wanted. Asking her to withdraw the charges is no more the equivalent of influencing her testimony than it is of inducing her not to attend the trial.

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an agreement or understanding that it will influence the testimony of a witness or information given to law enforcement.

Cribas was originally also charged with violating section 138, subdivision (a) and section 136.1, subdivision (c)(2). During the trial the court dismissed those counts pursuant to section 1118.1.

[5]The Supreme Court expressly declined to reach the issue of the continued viability of *Lichens* in the face of the subsequent amendment of Penal Code section 136 1/2. (*Id.* at p. 741, fn. 4.) We are not confronted with the distinction between the old and new versions of the statute.

However, assuming *Lichens* was correctly decided, Cribas gains little solace from this conclusion, because there is other evidence, not cited by either party, which is sufficient for conviction. Rojas testified that in one of his conversations with Danilo, Danilo suggested he say that on the day of the incident Rojas was drunk, had hit Luisa, and that she suffered from "nervousness" and did not know what had happened.

Because Cribas and Danilo were established as conspirators, Danilo's statements are attributable to Cribas for purposes of the substantive offense. (*People* v. *Brawley* (1969) 1 Cal.3d 277, 289 [82 Cal.Rptr. 161, 461 P.2d 361].) In fact, the jury was instructed with CALJIC No. 6.11, relating to joint liability for statements or acts of conspirators.[9] It would have been well within reason for the jury to attribute Danilo's statements to Cribas.[10]

These words and Danilo's subsequent action in delivering the money lead to a reasonable inference that the objective was to persuade Rojas and Luisa to falsify a statement to the police or in court about the rape. There was substantial evidence to support the conviction.

IV

(6) Cribas asserts reversal of his rape conviction requires reversal of the bribery and conspiracy convictions. He claims if no crime occurred, neither Luisa nor Rojas fit the definition of a "person about to be called as a witness" to a crime under the bribery statute. Because of the erroneous admission of the statements, he continues, the jury found him guilty of rape without properly considering this issue.

CALJIC No. 7.03, as read to the jury, defined the phrase as follows: "A 'person about to be called as a witness' includes: [any person who knows or

[9] "Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if said act or said declaration is in furtherance of the object of the conspiracy. [¶] The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators. [¶] A member of a conspiracy is not only guilty of the particular crime that to [his] [her] knowledge [his] [her] confederates are contemplating committing, but is also liable for the natural and probable consequences of any act of a co-conspirator to further the object of the conspiracy, even though such act was not intended as a part of the original plan and even though [he] [she] was not present at the time of the commission of such act. . . ."

[10] Notably, the jury, in its verdict on the conspiracy charge, specifically found conspiracies to commit *both* sections 137, subdivision (a) and 136.1, subdivision (b). The latter section prohibits attempting to "prevent or dissuade another person who has been the victim of a crime or who is witness to a crime" from pursuing a variety of legal actions. Cribas had originally been charged with this offense but the prosecutor, in midtrial, dismissed this count at the same time as the section 136 allegation, choosing instead to proceed by interlineating a section 137, subdivision (a) charge. Under the circumstances, the dismissal of the section 136.1, subdivision (b) charge may have been ill-advised.

who has been told that [he] or [she] will be called as a witness] or [any person who is a material witness to the issues of a case which already has been filed or which thereafter may be filed] or [any person about to give material information pertaining to a crime to a law enforcement official.]" Cribas points out the phrase "pertaining to a crime," in the third alternative bracketed definition, may have been the one upon which the jury settled. He interprets this phrase as requiring a crime which was actually committed.

This interpretation has utterly no legal or logical basis. The gravamen of the offense is the influencing of information given by someone who is or will be involved in legal proceedings. Whether the witness's original accusation is actually true is irrelevant, as is the result of the legal proceeding and whether the witness intends to carry out the agreement to testify falsely. (*People* v. *Pic'l*, *supra*, 31 Cal.3d at p. 739.)

As the Attorney General explains, the underlying crime need not be prosecuted. And, if there is a prosecution and the evidence proves insufficient for conviction, the offense of bribery is not diminished. There is nothing in the phrase "pertaining to a crime" from which we must conclude it means a crime which has actually been committed. More to the heart of the matter, even an acquittal does not mean a crime did not occur; it simply relieves the defendant of culpability.[11]

V

(7) Cribas objects to the failure of the court to instruct, sua sponte, pursuant to CALJIC No. 17.01, that the jury had to agree unanimously on the overt act or acts underlying the conspiracy charge or on the definition of a witness set forth in CALJIC No. 7.03 (see § IV, *ante*). There was no error.

We are persuaded that a specific unanimity instruction on overt acts was not required: "Inasmuch as the overt act, though required to establish the existence of a conspiracy, is not an actual element of the crime, it follows that the jury need only be unanimous in finding *an* overt act was done in furtherance of the conspiracy, not in finding a particular act was done. . . . Hence, the overt act is part of the 'theory' of the case, not an act constituting the offense. [Citation.] For the foregoing reasons, . . . a trial court need not instruct the jury they must unanimously agree as to the overt act done in pursuance of a conspiracy." (*People* v. *Jones* (1986) 180 Cal.App.3d 509, 516-517 [225 Cal.Rptr. 697].) Cases taking a contrary position have done so in dicta, with which we disagree. (*People* v. *Ramirez*

[11] The defense argument, taken to its logical conclusion, would mean a person who bribed a witness could not be prosecuted if acquittal on the underlying charge results from the subborned perjury.

(1987) 189 Cal.App.3d 603 [233 Cal.Rptr. 645], *People* v. *Brown* (1991) 226 Cal.App.3d 1361 [277 Cal.Rptr. 309].)

CALJIC Nos. 6.10 and 17.50 sufficiently apprised the jury of its duties. CALJIC No. 6.10 told the jury that proof of a conspiracy requires proof of at least one overt act. CALJIC No. 17.50 advised that all 12 jurors had to agree on a decision and to any findings in their verdict. "These most specific instructions must be viewed in conjunction with the unqualified requirements that proof be made beyond a reasonable doubt as to each element of an offense and that the verdict be unanimous. There is no inadequacy in the instruction given." (*People* v. *Skelton* (1980) 109 Cal.App.3d 691, 717 [167 Cal.Rptr. 636].)

For much the same reason, the CALJIC 17.01 instruction was not required for the definition of a "person about to be called as a witness." This constitutes a theory of guilt, on which a jury need not be specifically instructed they must agree. (*People* v. *Failla* (1966) 64 Cal.2d 560, 569 [51 Cal.Rptr. 103, 414 P.2d 39].)

As to the rape count, the judgment is reversed. Accordingly, the matter is remanded for resentencing on the bribery and conspiracy convictions. In all other respects, the judgment is affirmed.

Wallin, J., and Crosby, J., concurred.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
SEP 26 1991
Robert Wandruff Clerk
DEPUTY

THE PEOPLE, Respondent

v.

CESAR ELIAS CRIBAS, Appellant

Petitions for review DENIED.

LUCAS
Chief Justice

A-18

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No. October Term, 1991

THE STATE OF CALIFORNIA,

Plaintiff,

v.

CESAR ELIAS CRIBAS,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within PETITION FOR WRIT OF CERTIORARI as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty-one (41) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, November 19, 1991.

Arlene M. Ryan
ARLENE M. RYAN

Subscribed and sworn to before me
this 19th day of November 1991.

Jean M. Burns
Notary Public in and for said County and State

JEAN M. BURNS
NOTARY PUBLIC - CALIFORNIA
THE COUNTY OF SAN DIEGO
My Commission Expires Sept. 17 1995

Supreme Court, U.S.
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No. 91-996

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CESAR ELIAS CRIBAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The issue presented in this petition, which was expressly reserved in *Michigan* v. *Harvey*, 494 U.S. ___, [108 L.Ed.2d 293, 305, 110 S.Ct. 1176] (1990), and is the subject of numerous conflicting state and federal decisions, is whether evidence obtained in violation of the Sixth Amendment right to counsel, as interpreted in *Massiah* v. *United States*, 377 U.S. 201, [12 L.Ed.2d 246, 84 S.Ct. 1199] (1964), may be used for impeachment purposes?

2. Does the admissibility of such evidence for impeachment purposes hinge on a distinction between judicially created prophylactic rules and constitutional guarantees or, instead, on a balancing of the policy behind an exclusionary rule against the policy which demands truth from witnesses?

3. Whether respondent's statements to a prosecuting witness and victim of a crime, obtained in violation of the Sixth Amendment, are admissible for impeachment purposes under circumstances where the traditional standards for evaluating voluntariness and trustworthiness indicate an absence of coercion and duress?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF FACTS	4
Defense	11
STATEMENT OF THE CASE	13
HOW THE FEDERAL QUESTION IS PRESENTED	16
ARGUMENT	19
I. STATEMENTS OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT SHOULD BE ADMISSIBLE FOR IMPEACHMENT PURPOSES	19
A. The Court Of Appeal's Rule Of Admissibility Rests Improperly On Whether The Proffered Statements Were Taken In Violation Of A Prophylactic Rule Or Were Taken In Violation Of The Constitution Simply And Unequivocally.	20

TABLE OF CONTENTS (cont.)

Page

B. There Is A Conflict Between The Lower Courts On This Issue. 29

C. Our System Of Truth And Justice Depends On The Admissibility Of Evidence For Impeachment Unless Exclusion Is Constitutionally Compelled. 32

D. Conclusion. 37

CONCLUSION 39

APPENDIX A-1 - A-42

TABLE OF AUTHORITIES

CASES	Page
Harris v. *New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971)	et passim
Hawthorne v. *United States*, 504 A.2d 580 (D.C. 1986)	33
Maine v. *Moulton*, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985)	34
Market Street Railroad Co. v. *Railroad Commission*, 324 U.S. 548, 89 L.Ed. 1438, 65 S.Ct. 1020 (1945)	3
Martinez v. *United States*, 566 A.2d 1049 (D.C. App. 1989)	30
Massiah v. *United States*, 377 U.S. 201, 12 L.Ed.2d 246, 84 S.Ct. 1199 (1964)	i, 16, 17, 19
Michigan v. *Harvey*, 494 U.S. ___, 108 L.Ed.2d 293, 110 S.Ct. 1176 (1990)	et passim
Michigan v. *Tucker*, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974)	36
Oregon v. *Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed. 570 (1975)	et passim

TABLE OF AUTHORITIES (cont.)

	Page
People v. *Bacino*, 41 Ill.App.3d 738, 354 N.E.2d 641 (1976)	30-31
People v. *Cesar Elias Cribas*, 231 Cal.App.3d 596, 282 Cal.Rptr. 538 (1991)	2, 21, 34
People v. *Gonyea*, 421 Mich. 462, 365 N.W.2d 136, (1984)	30
People v. *Ricco*, 56 N.Y.2d 320, 437 N.E.2d 1097, (1982)	30
State v. *Swallow*, 405 N.W.2d 29 (S.D. 1987)	30
State v. *Thomas*, 698 S.W.2d 942 (Mo.Ct.App. 1985)	30
Tate v. *United States*, 109 U.S.App.D.C. 13, 283 F.2d 377 (1960)	31
United States v. *Brown*, 699 F.2d 585 (2d Cir. 1983)	30
United States v. *Calandra*, 414 U.S. 338, 38 L.Ed.2d 561, 94 S.Ct. 613 (1974)	36
United States v. *Frank*, 520 F.2d 1287 (2d Cir. 1975)	30

TABLE OF AUTHORITIES (cont.)

	Page
United States v. *Havens*, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980)	28, 32-33
United States v. *Henry*, 477 U.S. 264, 65 L.Ed.2d 115, 100 S.Ct. 2183 (1980)	34
United States v. *McManaman*, 606 F.2d 919 (10th Cir. 1979)	30
Walder v. *United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954)	et passim

TABLE OF AUTHORITIES (cont.)

	Page
CONSTITUTIONAL PROVISIONS	
United States Constitution	
Fourth Amendment	23, 28, 30
Fifth Amendment	et passim
Sixth Amendment	et passim
Fourteenth Amendment	4
STATUES	
California Penal Code	
§ 137, subd. (a)	13
§ 182	13
§ 261, subd. (2)	13
§ 1538.5	13
Title 28, United States Code	
section 1257(a)	2

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CESAR ELIAS CRIBAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, the People of the State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division Three, issued on June 21, 1991.

OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division Three is reported at 231 Cal.App.3d 596 and 282 Cal.Rptr. 538 and appears as Appendix A (pages A-1 through A-41.)

The order of the Supreme Court of California denying Petitioner's petition for review is reproduced in Appendix B at page A-42.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, section 1257(a) to review a judgment of the California Court of Appeal, Fourth Appellate District, Division Three which was entered on June 21, 1991. The California Supreme Court denied review in this case on September 26, 1991. The present petition for writ of certiorari is filed

within the required 90-day period following the final entry of judgment. The judgment of the Court of Appeal became final for the purposes of this Court with the denial of review by the California Supreme Court on September 26, 1991. (*Market Street Railroad Co.* v. *Railroad Commission*, 324 U.S. 548, 550-552, [89 L.Ed. 1438, 65 S.Ct. 1020 (1945).) Thus, the instant judgment is a final decision rendered by the highest court of the State of California interpreting rights under the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

> confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Amendment XIV [pertinent part]:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

STATEMENT OF FACTS

In early March of 1989, respondent met Ernesto Rojas and his girlfriend, Luisa B., in the laundry room of their apartment building, where respondent resided. (RT 69-70.) Rojas and Luisa had been living with Rojas' uncle but were

having problems there. Respondent offered to allow them to move into his apartment, stating he would be glad to have help with the rent. (See RT 202.)

Sometime after the two moved into the apartment, respondent made an unsolicited advance toward Luisa while Rojas was away. As Luisa was cooking, respondent approached her, fondled one of her breasts, and put a hand down her pants. (RT 75-77.) Respondent told Luisa not to tell Rojas about the incident. (RT 77.) When Rojas came home, however, Luisa told him what happened. Rojas became angry and threatened to hit respondent, but Luisa talked him out of it by reminding him they would have to move out and had no place to go. (RT 84-85.)[1]

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[1] Apparently the financial situation of Rojas and Luisa was poor. Although Luisa worked and earned money to contribute to the rent and to pay for food, Rojas was looking for work and was unemployed. (RT 73-74; see also, 196, 228.)

The following day, respondent and Rojas were drinking. After a while, respondent gave Rojas some money to buy some liquor and sent him out with the keys to his car. (RT 89-93.) When Rojas left, Luisa got up to go after him but was stopped by respondent. He took her to the couch and began kissing her forcefully. At one point, Luisa managed to break free and ran to the door, but respondent followed her and locked it with the deadbolt. (RT 95-98.) Respondent grabbed Luisa and pushed her down on the floor. (RT 98.) He got on top of Luisa and started to bring her skirt up and to spread her legs. (RT 99-100.) Respondent then got up, raised the volume on the tape recorder, carried Luisa to the bedroom where he bolted the door and forcibly had sexual intercourse with her. (RT 100-109.)

Shortly thereafter, they heard Rojas pounding on the bedroom door. (RT 110.) Respondent immediately got up, which allowed Luisa to break free and unlock the door. She ran into Rojas' arms, crying. (RT 110-111.) Rojas, who was furious, called the police after Luisa told him that respondent had raped her. (See RT 187-188.)

The following day, Luisa received a telephone call from respondent, calling from the jail, urging her to withdraw the charges so that he could get out of jail. He told her his attorney would take care of having the charges dropped. At one point, Luisa put the phone down, and the call was disconnected. (RT 189-191.) Respondent also spoke to Rojas, apologized to him and asked him to forgive him for what had happened. Respondent claimed that he did not know what he was doing, as he had been drinking. (RT 227.)

Later on in the day, Rojas and Luisa were visited by respondent's brother, Danilo Cribas; Rojas spoke to him at that time. Danilo offered Rojas and Luisa $300 if they would help respondent by withdrawing the charges. (RT 192.) Rojas would not agree to anything at that time. (RT 192.) A few days later, Danilo came to the apartment and offered to pay them $500. (RT 194.) At that time, Danilo told Rojas that he should convince Luisa to accept the money. (RT 195.) He also told Rojas that they should tell the police that the day the offense happened Rojas was drunk, that he had hit his girlfriend, and that "she suffers from nervousness." (RT 195.) Rojas said that they would have to pay $5,000. He chose this figure thinking that they would never have that kind of money and would leave them alone. (RT 196.)

After this conversation, Luisa and Rojas went to the police station and reported what respondent and his brother had attempted to do. (RT 116, 196.) Due to the fact that Luisa and Rojas had been evicted, the police got them a motel room. (RT 197.) The police instructed them that, if offered money again, they should accept. (RT 197.) The police also arranged to have a tape recorder attached to the telephone. (RT 198.)[2] When Rojas went to the apartment to get his clothes, he ran into Danilo Cribas. Danilo wanted to know where they were living and wanted their telephone number. (RT 221.) At that time, Rojas told Danilo that Luisa

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[2] At the hearing on respondent's motion to suppress, evidence was presented that police told Luisa to speak with respondent and ask him why he had raped her; this was done in order to obtain respondent's admission so as to bolster the bribery offense which was under investigation. (RT 22, 28.)

wanted to hear from respondent. (RT 221-222.)

Respondent subsequently telephoned and spoke at length with Luisa. He admitted he had raped her and blamed it on the alcohol; he also asked her to withdraw the charges so he could get out of custody.[3] (RT 120; see also, People's Exhibit 6.)

It was not long before Rojas and Luisa received another call from Danilo offering to pay $1,000. (RT 199.) Danilo also made a subsequent call and made arrangements to have the money brought. (RT 199.) Danilo was later arrested when he attempted to complete the transaction. (RT 237-238.) At the time of his arrest, Danilo Cribas had a total of $2,116 on his person. (RT 238.)

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[3] This was the recorded telephone conversation offered for impeachment purposes.

Defense

Respondent testified on his own behalf at trial. (RT 252.) He testified that after Rojas left the liquor store, Luisa approached him while he was in his bedroom making a telephone call. There, she made sexual overtures and he tried to respond, but was unable to achieve an erection. He did not know the bedroom door was locked and believed Luisa locked it. When Rojas began shouting and knocking on the door, Luisa unlocked it and began crying. Respondent denied previously fondling Luisa the day before. (RT 259, 265-270.)

Although respondent admitted calling Rojas and Luisa from the jail and asking if they could help him get out of jail by withdrawing the charges, he claimed that it was Rojas who asked for money. (RT 274-276.) Respondent testified that when he telephoned, Luisa asked him a lot of

questions and he told her what she wanted to hear, in hopes she would withdraw the charges. (RT 286.)

On cross-examination, the prosecutor impeached respondent with his recorded telephone conversation with Luisa where he admitted the rape. (RT 301-302.) The actual tape recording, as well as the transcript of the recording, were also received into evidence for impeachment purposes. (RT 122, 242-243, 313-314; People's Exhibits 2, 3, and 6.)

All of this evidence was offered for the purpose of showing respondent was lying when he testified that he had not raped Luisa, and that, instead, she had made sexual advances to him; this evidence was also offered to show respondent was lying when he testified that he had later admitted the rape to Luisa for the sole purpose of getting her to "drop the charges."

STATEMENT OF THE CASE

In an information filed by the District Attorney of Orange County on June 23, 1989, respondent was charged with one count of forcible rape, in violation of California Penal Code section 261, subdivision (2); one count of bribing witnesses in order to influence their testimony, in violation of California Penal Code section 137, subdivision (a); and one count of conspiring to bribe witnesses, in violation of California Penal Code section 182. (CT 244-246.)[4]

On November 8, 1989, respondent filed a motion, pursuant to California Penal Code section 1538.5, to suppress statements made by him in a taped

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[4] "CT" refers to the Clerk's Transcript of the trial court's documents and orders. "RT" refers to the reporter's transcript of the trial court proceedings. The Clerk's and Reporter's Transcripts were part of the official record before the California Court of Appeal and California Supreme Court.

telephone call as obtained in violation of the Sixth Amendment. (CT 254-460.) Respondent's motion was subsequently denied. (CT 276.)

On November 13, 1989, a jury trial commenced. (CT 268.) Respondent testified at the trial in his defense. The prosecution used respondent's recorded statements to impeach him. (RT 301-302.)

On November 21, 1989, the jury found respondent guilty of forcible rape, bribery of witnesses and conspiracy to bribe witnesses, as charged. (CT 370-371.)

On January 26, 1990, respondent was sentenced to the lower term of three years for his conviction of rape. He received an additional eight months, consecutive, for his conviction of bribing witnesses. The sentence on respondent's conviction for conspiracy was ordered stayed. (CT 381.)

On February 15, 1990, respondent filed a notice of appeal from the judgment. (CT 396-397.)

On June 21, 1991, in a published opinion, the Court of Appeal, Fourth Appellate District, Division Three, affirmed in part and reversed in part. The court reversed respondent's conviction of forcible rape, holding that statements made by him and admitted for impeachment purposes were obtained in violation of the Sixth Amendment to the Constitution; the court ruled evidence obtained in violation of the Sixth Amendment cannot be used for impeachment purposes. (Appendix A.)

On September 26, 1991, the California Supreme Court denied petitioner's petition for review. (Appendix B.)

HOW THE FEDERAL QUESTION IS PRESENTED

In the trial court, respondent moved to suppress evidence of his statements, made in a recorded telephone conversation, on the ground that the statements were obtained in violation of the Sixth Amendment and *Massiah* v. *United States*, *supra*, 377 U.S. at p. 201. The prosecution sought to admit this evidence solely for impeachment purposes. (See CT 276; see also, RT 18, 313.) The trial court denied respondent's motion to suppress and ruled the statements obtained could be used by the prosecution for impeachment purposes. (CT 276; see also, RT 53.)

Respondent subsequently testified at trial in his defense. The prosecution used respondent's recorded statements, wherein respondent made admissions to the victim acknowledging the rape, to impeach respondent's previous inconsistent

testimony to the jury. (RT 252, 301-302; see also, People's Exhibit 6.) Additionally, the prosecution's motion to admit the tape recording and a transcript of the tape recording was granted. (RT 122, 242-243, 313-314.)

In the California Court of Appeal, Fourth Appellate District, Division Three, respondent contended statements he made to the victim were obtained in violation of the Sixth Amendment to the federal Constitution and *Massiah* v. *United States*, *supra*, 377 U.S. 201, and were accordingly improperly admitted. Petitioner argued that respondent's statements were not obtained in violation of the Sixth Amendment and, in any event, the evidence was appropriately admitted. The California Court of Appeal, Fourth Appellate District, Division Three, concluded that respondent's taped telephone statements were indeed taken in

violation of the Sixth Amendment to the United States Constitution and such evidence could not be admitted for any purpose, including for the purpose of impeachment. (Appendix A.)

Petitioner filed a petition for review in the California Supreme Court arguing that the Court of Appeal improperly held as a matter of law that statements obtained in violation of the Sixth Amendment cannot be used for impeachment purposes. Petitioner further argued that under *Michigan* v. *Harvey*, *supra*, 494 U.S. ____, [108 L.Ed.2d 293], respondent's statements could properly be used against him for impeachment purposes, and the exclusionary rule should not bar the use of illegally seized evidence to impeach a criminal defendant. The California Supreme Court denied petitioner's petition for review. (Appendix B.)

ARGUMENT

I.

STATEMENTS OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT SHOULD BE ADMISSIBLE FOR IMPEACHMENT PURPOSES

The issue presented in this case is whether the rationale employed by the Court in *Walder* v. *United States*, 347 U.S. 62, [74 S.Ct. 354, 98 L.Ed. 503] (1954), *Harris* v. *New York*, 401 U.S. 222, [91 S.Ct. 643, 28 L.Ed.2d 1] (1971), and *Oregon* v. *Hass*, 420 U.S. 714, [95 S.Ct. 1215, 43 L.Ed. 570] (1975), applies here, where statements were obtained in violation of respondent's Sixth Amendment right to counsel, as interpreted in *Massiah* v. *United States*, *supra*, 377 U.S. 201. Specifically, the question presented is whether statements obtained in

violation of the Sixth Amendment may be used for impeachment purposes.[5]

A. The Court Of Appeal's Rule Of Admissibility Rests Improperly On Whether The Proffered Statements Were Taken In Violation Of A Prophylactic Rule Or Were Taken In Violation Of The Constitution Simply And Unequivocally.

The California Court of Appeal in this case reversed respondent's rape conviction, holding that respondent's statements were obtained in violation of the Sixth Amendment to the Constitution, simply and unequivocally, rather than in violation of "`only a prophylactic rule,'" relying on its interpretation of this Court's decision in *Michigan* v. *Harvey*, *supra*, 494 U.S. ___, [108 L.Ed.2d 293]. The Court of Appeal held that statements taken in violation of "`only a

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[5] We do not challenge the California Court of Appeal decision finding there was a violation of the Sixth Amendment to the Constitution.

prophylactic rule'" may be used for impeachment purposes, however, statements taken simply and unequivocally in violation of the Constitution cannot be used for any purpose, including for the purpose of impeachment. (*People* v. *Cribas*, *supra*, 231 Cal.App.3d at p. 606.)

The Court of Appeal fashioned a new rule of admissibility contingent on whether evidence is obtained in violation of a *core right* versus a *prophylactic rule*. In so holding, the Court of Appeal has ignored definitive declarations by this Court that a defendant may not "turn the illegal method by which evidence in the Government's possession was obtained to his own advantage and provide himself with a *shield* against contradiction of his untruths." (*Walder* v. *United States*, *supra*, 347 U.S. at p. 65; italics added; *Harris* v. *New York*, *supra*, 401 U.S. at p.

224; see also, *Oregon* v. *Hass*, *supra*, 420 U.S. at pp. 721-723.)

In addition, the Court of Appeal's reliance on a technical distinction between *core* and *prophylactic rule* violations is misguided. The Court's decision in *Michigan* v. *Harvey*, *supra*, 494 U.S. ___, [108 L.Ed.2d 293], never defined the rule of admissibility of evidence for impeachment purposes as hinging on a distinction between a "prophylactic" and "core" violation.

Instead, in evaluating whether illegally obtained evidence may be used to impeach a criminal defendant, this Court has consistently balanced the policy of the exclusionary rule against the policy which demands truth from witnesses in adversary proceedings. (See *Oregon* v. *Hass*, *supra*, 420 U.S. at pp. 721-723; *Harris* v. *New York*, *supra*, 401 U.S. at pp.

224-225; *Walder* v. *United States*, *supra*, 347 U.S. at p. 65.)

Moreover, any reliance on a *core* versus *prophylactic* distinction is belied by the Court's decision in *Walder* v. *United States*, *supra*, 347 U.S. 65, where it was held that a violation of the Fourth Amendment would not preclude the use of evidence seized, via an illegal method, for impeachment purposes. (*Ibid.*) The violation in *Walder* was as "`simply and unequivocally'" (*People* v. *Cribas*, *supra*, 231 Cal.App.3d 606, quoting *People* v. *Harper*, 228 Cal.App.3d 843, 852 [279 Cal.Rptr. 204] (1991)), a violation of the Fourth Amendment as the violation in the instant case was of the Sixth Amendment.

In *Walder* v. *United States*, *supra*, the Court held that evidence obtained in violation of the Fourth Amendment, although not admissible to secure a conviction, could, in fact, be admissible

for impeachment purposes. A defendant may not "affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." (*Id.*, at p. 65.) To allow otherwise, "would be a perversion of the Fourth Amendment." (*Id.*)

Subsequently, in the Fifth Amendment context, the Court in *Harris* v. *New York*, *supra*, 401 U.S. 222, used the same rationale in allowing statements obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), to be used for impeachment purposes, provided of course that the trustworthiness of the evidence satisfied legal standards. (*Id.*, at pp. 224-225.)

> "The shield provided by *Miranda*, *supra*, cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." (*Id.*, at p. 226.)

Such would be a perversion of the Fifth Amendment.

Similarly, the court in *Oregon* v. *Hass*, 420 U.S. 714 [95 S.Ct. 1215, 43 L.Ed. 570] (1975), held that evidence obtained in violation of the Fifth Amendment may be admissible for impeachment purposes. "We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution." (*Id.*, at p. 722.) The Court noted that if the statements sought to be admitted were obtained through government conduct amounting to abuse, such a case, like those involving coercion or duress, could be appropriately measured by "the traditional standards for evaluating voluntariness and trustworthiness." (*Oregon* v. *Hass*, *supra*, 420 U.S. at p. 723.)

Recently, in *Michigan* v. *Harvey*, *supra*, 494 U.S. ___, 108 L.Ed.2d 293, the Court held that a statement to police taken in violation of *Michigan* v. *Jackson*, 475 U.S. 625 [89 L.Ed.2d 631, 106 S.Ct. 1404] (1986), could, in fact, be used to impeach a defendant's testimony. In *Michigan* v. *Jackson*, *supra*, the Court created a bright-line rule for deciding whether an accused who has "asserted" his Sixth Amendment right to counsel has subsequently waived that right. In denying the argument a *Jackson* violation implicates the Sixth Amendment such that a different result was justifiable, the Court stated that "nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney." (*Michigan* v. *Harvey*, *supra*, [108 L.Ed.2d at p. 303].) The Court, once

again, decided that the "`search for truth in a criminal case' outweighs the `speculative possibility' that exclusion of evidence might deter future violations of rules not compelled directly by the constitution in the first place. [citations omitted]." (*Ibid.*)[6]

The court reiterated:

> "The prosecution must not be allowed to build its case against a criminal defendant with evidence acquired in contravention of constitutional guarantees and their corresponding judicially-created protections. <u>But use of statements so obtained for impeachment purposes is a different matter</u>. If a defendant exercises his right to testify on his own behalf, he assumes a reciprocal `obligation to speak truthfully and accurately,' [citation omitted], and we have consistently rejected argument that would allow a defendant to

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[6] This Court specifically left open the question of the admissibility for impeachment purposes of a voluntary statement obtained in the absence of a knowing and voluntary waiver of the right to counsel. (*Michigan* v. *Harvey*, *supra*, 494 U.S. ___, [108 L.Ed.2d at p. 305].)

> `"`turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.'"' [Citations omitted]." (*Michigan* v. *Harvey*, *supra*, 494 U.S. ___, [108 L.Ed.2d 293, 302-303]; emphasis added; see also, *Oregon* v. *Hass*, *supra*, 420 U.S. at p. 722; *Walder* v. *United States*, *supra*, 347 U.S. at p. 65; *United States* v. *Havens*, 446 U.S. 620, 626, [100 S.Ct. 1912, 1916-1917, 64 L.Ed.2d 559] (1980).)

The decision by the Court of Appeal, here, narrowly reads *Michigan* v. *Harvey*, *supra*, in order to establish a new rule regarding the admissibility of illegally obtained evidence for impeachment. However, why is a violation of the Sixth Amendment any more compelled ["core"] than a violation of the Fifth or Fourth Amendment? (*Oregon* v. *Hass*, *supra*, 420 U.S. 714; *Harris* v. *New York*, *supra*, 401 U.S. 222; *Walder* v. *United States*, *supra*, 347 U.S. 62.) The Court of Appeal's reliance on distinction between a

violation of a *prophylactic rule* and a violation which is deemed *core* and in a pristine form, finds no support in this Court's prior decisions.

Certiorari should be granted to consider the important federal question left open in *Michigan* v. *Harvey*, *supra*, 494 U.S. ___, [108 L.Ed.2d at p. 305], pertaining to the admissibility for impeachment purposes of statements taken in violation of the Sixth Amendment.

B. <u>There Is A Conflict Between The Lower Courts On This Issue.</u>

Lower courts are divided on whether statements obtained in violation of the Sixth Amendment are admissible for impeachment.

Some state and federal courts which have addressed the issue have taken the approach that a separate set of Sixth Amendment principles should apply that *always* results in suppression of the illegally seized evidence for impeachment.

(See e.g., *United States* v. *Brown*, 699 F.2d 585, 588-591 (2d Cir. 1983); *People* v. *Gonyea*, 421 Mich. 462, 477-483, [365 N.W.2d 136, 143-145] (1984).)

However, there are a number of state and federal courts which have decided that such evidence can in fact be introduced as impeachment evidence, just as evidence obtained in violation of the Fourth and Fifth Amendments can be introduced and for the identical reasons. (See e.g., *Martinez* v. *United States*, 566 A.2d 1049 (D.C. App. 1989); *State* v. *Swallow*, 405 N.W.2d 29, 39-41 (S.D. 1987); *State* v. *Thomas*, 698 S.W.2d 942, 947-949 (Mo.Ct.App. 1985); *People* v. *Ricco*, 56 N.Y.2d 320 [437 N.E.2d 1097, 1100] (1982); *United States* v. *McManaman*, 606 F.2d 919, 924-925 (10th Cir. 1979); *United States* v. *Frank*, 520 F.2d 1287, 1291 (2d Cir. 1975), cert. denied, 423 U.S. 1087 [96 S.Ct. 878, 47 L.Ed.2d 97] (1976). *People* v. *Bacino*,

41 Ill.App.3d 738, 739, [354 N.E.2d 641, 642] (1976); *Tate* v. *United States*, 109 U.S.App.D.C. 13, 15, [283 F.2d 377, 379] (1960).) Each of these cases relied on one or more of the three previously cited Supreme Court decisions: *Walder* v. *United States*, *supra*, 347 U.S. 62, the seminal case on the subject of impeachment with illegally obtained evidence, and that case's two main progeny, *Harris* v. *New York*, *supra*, 401 U.S. 222, and *Oregon* v. *Hass*, *supra*, 420 U.S. 714.[7]

The courts which have admitted such evidence for impeachment purposes have appeared to reach this conclusion after a cautious balancing of two competing policies of the law:

(1) the policy that proscribes, as a prophylactic measure, the use of evidence

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[7] All of these cases, of course, were decided prior to *Michigan* v. *Harvey*, *supra*.

obtained in violation of a rule of law [an exclusionary rule], and

(2) the policy which demands truth from witnesses in the judicial process and which regards an adversary judicial proceeding as a search for truth.

Petitioner submits certiorari should also be granted to resolve the conflict which exists in the lower courts as to the question of whether statements obtained in violation of the Sixth Amendment can be used for impeachment.

C. Our System Of Truth And Justice Depends On The Admissibility Of Evidence For Impeachment Unless Exclusion Is Constitutionally Compelled.

Since the credibility of witnesses is of the utmost importance as a factor in the jury's search for truth, impeachment by a prior inconsistent statement, even one illegally obtained, aids the jury in its truth-seeking function. (See *United States* v. *Havens*, *supra*, 446 U.S. 620,

626-628, 100 S.Ct. at pp. 1916-1917; *Hawthorne* v. *United States*, 504 A.2d 580, 591 (D.C. 1986) ("any unchecked lie is likely to enhance a witness' credibility." ([Citations omitted]; cert. denied, 479 U.S. 992 [107 S.Ct. 593, 93 L.Ed.2d 594] (1986).) Balanced against the tradition of using the adversary process and the jury system as truth-seeking mechanisms is the competing policy of deterring future police misconduct.

Admittedly, police may have little to lose and something to gain by questioning a defendant who has invoked his Sixth Amendment right to counsel. However, as in Fifth Amendment cases, the balance should be struck in favor of admitting impeachment material obtained by such questioning unless the statement was obtained by the use of abusive tactics, coercion, or duress. If statements <u>are</u> obtained by abusive or coercive measures,

APPENDIX A

then the exclusionary rule and its twin supports, the usual standards for judging the voluntariness and trustworthiness of statements, will be available to take care of the matter. (E.g., *Maine* v. *Moulton*, 474 U.S. 159 [106 S.Ct. 477, 88 L.Ed.2d 481] (1985).)

The Court of Appeal here improperly likens this case with the Government overreaching and manipulation found in *Maine* v. *Moulton*, *supra*, 474 U.S. 159, [88 L.Ed.2d 481, and *United States* v. *Henry*, 477 U.S. 264 [65 L.Ed.2d 115, 100 S.Ct. 2183] (1980). The Court of Appeal accordingly concludes that the rape victim in this case was an "informant." Further, because the victim/witness was receiving a motel room at taxpayer expense, the court finds that she was "a *paid* informant." (*People* v. *Cribas*, *supra*, 231 Cal.App.3d at pp. 603-604, emphasis added.) However, the evidence shows the rape victim in this

case was a Mexican alien who, together with her husband, had no substantial income or housing. (See RT 73, 118, 128.)

Moreover, although the statements here were obtained in violation of the Sixth Amendment, the statements were trustworthy and reliable under the circumstances of this case.

Where the statements are otherwise voluntary and trustworthy, the statements should be admitted for impeachment purposes in order to allow the jury the means of ascertaining the truth. Respondent voluntarily chose to speak to the victim he raped, and he had no reasonable expectation the victim would not attempt to use those statements against him, particularly where those statements were made in the context of bribing and intimidating the victim. Accordingly, he should not be permitted to

subsequently hide behind the Sixth Amendment to commit perjury.

The "shield" provided by the Sixth Amendment should not be perverted into a "sword" to commit perjury. (See *Walder* v. *United States*, *supra*, 347 U.S. at p. 65; *Harris* v. *New York*, *supra*, 401 U.S. at pp. 224-225; and *Oregon* v. *Hass*, *supra*, 420 U.S. at pp. 721-722.)

The exclusionary rule serves the entirely valid and useful purpose of preventing, but not repairing, police conduct that results in a constitutional violation. (See *Michigan* v. *Tucker*, 417 U.S. 433, 446, [94 S.Ct. 2357, 2364, 41 L.Ed.2d 182] (1974); *United States* v. *Calandra*, 414 U.S. 338, 347 [38 L.Ed.2d 561, 94 S.Ct. 613, 619] (1974).) However, the policy that proscribes, as a prophylactic measure, the use of evidence obtained in violation of an exclusionary

rule must be balanced against the policy that demands truth from witnesses.

D. Conclusion.

The decision by the Court of Appeal misconstrues this Court's decision in *Michigan* v. *Harvey*, *supra*, and has adopted a new rule of exclusion of evidence for impeachment purposes that is inconsistent with the Court's rationale stated in *Walder*, *Harris* and *Hass*, *supra*. This rule will permit a defendant to lie with immunity in the face of illegally obtained, and previously made, inconsistent statements by him, committing perjury in the name of the Sixth Amendment.

If a defendant elects to testify on his own behalf, he must speak truthfully and accurately and the prosecution should and must be able to confront him with any inconsistent statements in order to preserve the truth-seeking process. The

"shield" provided by the exclusionary rule should not be "perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." (*Harris* v. *New York*, *supra*, 401 U.S. at pp. 222, 226.)

In conclusion, petitioner submits the Sixth Amendment should not sanction perjury in the name of the Constitution and respectfully requests this Court settle this important federal question.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the writ of certiorari should issue to review the decision of the California Court of Appeal in this case.

Dated: November 7, 1991.

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APPENDIX A

CERTIFIED FOR PUBLICATION

[Filed June 21, 1991]

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CESAR ELIAS CRIBAS, Defendant and Appellant.	G009230 (Superior Ct. No. C-74030) OPINION

Appeal from a judgment of the Superior Court of Orange County, Richard J. Beacom, Judge. Affirmed in part and reversed in part.

Charles R. Khoury, Jr., and Anthony Dain, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren and John K. Van de Kamp, Attorneys General, Richard B. Iglehart, Chief Assistant Attorney

General, Harley D. Mayfield, Senior Assistant Attorney General, Janelle B. Davis, Supervising Deputy Attorney General, and Pamela A. Ratner, Deputy Attorney General, for Plaintiff and Respondent.

Cesar Elias Cribas was convicted by a jury of rape (Pen. Code, § 261, subd. (2)),[1] bribery of witnesses (§ 137, subd. (a)), and conspiring with his brother, Danilo, to bribe witnesses (§ 182). He asserts a tape recorded conversation between him and the victim was admitted in violation of the mandates of the United States Supreme Court in *Massiah* v. *United States* (1964) 377 U.S. 201, and contained statements which were involuntary. He also challenges the sufficiency of the evidence to support the bribery-related convictions.

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[1] All statutory references are to the Penal Code unless otherwise specified.

I

In March 1989, Cribas met Ernesto Rojas and his girlfriend, Luisa B., in the laundry room of the apartment complex where Cribas resided. Rojas and Luisa had been living with Rojas' uncle, but were having problems there. Cribas offered to allow them to move into his apartment, stating he would be glad to have help with the rent.

Sometime after the two moved into the apartment, Cribas made an unsolicited advance toward Luisa while Rojas was away. As Luisa was cooking, Cribas approached her, fondled one of her breasts, and put a hand down her pants. She became upset and told him to leave her alone. He did so and, when Rojas came home, Luisa told him what had happened. Rojas became angry and threatened to hit Cribas, but Luisa talked him out of it by pointing out they would have to move out and had no place to go.

On the following day, Cribas and Rojas were drinking. After a while, Cribas gave Rojas some money and the keys to his car and sent him out to buy some liquor. When Rojas left the apartment, Luisa started to follow but was stopped by Cribas. He took her to the couch and began kissing her forcefully. At one point, Luisa managed to break free and ran to the door, but Cribas followed her and locked it with the deadbolt.

Cribas forced Luisa onto the floor and began raising her skirt and spreading her legs. He then got up and carried Luisa into the bedroom, where he bolted the door and forcibly had intercourse with her. They then heard Rojas pounding on the bedroom door. Luisa broke free and unlocked the door, running into Rojas' arms, crying. Rojas called the police, who arrested Cribas and took Luisa to a clinic.

The next day, April 2, Cribas telephoned Luisa at the apartment and urged her to withdraw the charges so that he could get out of jail. He told her his attorney would take care of having the charges dropped. At this point, the connection was accidentally cut off. She could not remember whether Cribas offered to give her some money during this conversation.

That evening, Cribas' brother, Danilo, came to see Luisa and Rojas and asked them to help Cribas by withdrawing the charges, offering them $300. A few days later, he returned and offered them $500. Rojas told Danilo they would possibly help for $5,000. Rojas testified he tossed out that figure because he wanted to get rid of Danilo and knew he would never be able to raise that much money.

The following day, Rojas and Luisa were evicted from the apartment. They told the police about the telephone call from Cribas and the visits from Danilo. The police obtained a motel room for them and connected a tape recorder to the telephone. Police Officer Allen Caddell instructed them to give Danilo their new telephone number and to tell him to have Cribas call from jail. He also instructed them to accept any money offered by Cribas or Danilo. He told Luisa to speak with Cribas and asked him why he had raped her, in order to obtain his admission that he had indeed done so and to bolster the evidence of the bribery offense.

Cribas called on April 8 and first spoke with Rojas, telling him he was sorry. He said he had been drinking and did not know what he was doing. Cribas

also spoke at length with Luisa.[2] He

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[2] The relevant portions of the taped conversation were transcribed as follows:

"L.B.: Huh? (What?)

"C.C.: My brother told me you wanted to talk to me.

"L.B.: Yes.

"C.C.: Uh, huh (Affirmative)

"L.B.: Look, Cesar.

"C.C.: Huh, huh (Affirmative)

"L.B. If you answer these question . . .

"C.C.: Uh, huh (Affirmative)

"L.B.: It is possible that I may be able to help you.

"C.C.: Yes, but as I told you, I want to, I want to help you right now, but, but, when I get out then I will. In here how can I be of help to you?

"L.B.: Huh? (What?)

"C.C.: While I am in here how can I help you? I can't help you in here and in whatever you need me for. I am here serving some time. But, I don't know what you want . . . or, what is the question you wanted to ask me?

"L.B.: They are questions. It is not only one question.

"C.C.: Uh, huh (Affirmative) Okay.

"L.B.: Look, I want to know why you raped me. What was your reason.

"C.C.: Huh? (What?)

"L.B.: I want to know why you raped me. What was your reason?

"C.C.: To tell you the truth, I cannot tell you, because, because when one is drunk, one does not know what he is doing, right?

"L.B.: You don't know what you did?

"C.C.: Uh, huh. (Affirmative)

"L.B.: But, you did it.

"C.C.: Yes, that is why I'm telling you because when one is very drunk one does not know what he is doing. Since Friday, I was drinking and INAUDIBLE

"L.B.: But you do admit that you did it?

"C.C.: Huh? (What?)

"L.B.: You do accept the fact that you did rape me?

"C.C.: Uh, huh (Affirmative) Well, I accept it.

"L.B.: Okay. The other one.

"C.C.: Uh, huh (Affirmative)

"L.B.: I think that my neighbors found out that I was crying. There are witnesses.

"C.C.: Uh, huh (Affirmative) INAUDIBLE

"L.B.: The last one.

"C.C.: Uh, huh (Affirmative)

"L.B.: Did you enjoy doing what you did to me?

"C.C.: Oh, well, I don't know. INAUDIBLE

"L.B.: What?

responded to her questioning by admitting he had raped her and pleading with her to withdraw the charges she had leveled, so that he could get out of jail. Luisa then asked him for money, which he claimed he did not have and could not get as long as he was in custody. The contents of the conversation were recorded and a transcription of the portion relating to the bribery was admitted into evidence.

"C.C.: No, no, no, "I don't think it was right.

"L.B.: You did not think it was right what you did?

"C.C.: No . . . INAUDIBLE Uh, uh (No)

"L.B.: Yes, because my husband is upset.

"C.C.: Yes, I know. I would also be upset. INAUDIBLE

"L.B.: Can you imagaine [sic] how I feel knowing that you forced me? Answer me.

"C.C.: Yes, I can imagine how you feel. Certainly, it's true. When one is drunk one does not know.

"L.B.: No, now you don't know, but you did do it."

Later, Luisa and Rojas received a call from Danilo, which they also recorded, asking if they had spoken with Cribas and offering them money. In another call, they settled on an amount with Danilo, and he was arrested when he went to their motel to deliver it.

At trial, Cribas testified that after Rojas left to buy the liquor, Luisa approached him while he was in his bedroom making a telephone call. She made sexual overtures and he tried to respond, but was unable to achieve an erection. He did not know the bedroom door was locked and believed Luisa locked it. When Rojas began shouting and knocking on the door, Luisa unlocked it and began crying. Cribas also denied touching Luisa the day before.

Following his arrest, Danilo told Cribas he was going to speak to a lawyer about getting Luisa to drop the charges.

He told Cribas Luisa wanted to talk to him before she would agree to help, and gave him her number. When Cribas called, Luisa asked him a lot of questions. He told her what she wanted to hear, in hopes of convincing her to withdraw the charges. On cross-examination, the prosecutor questioned Cribas extensively on the portion of the recorded telephone conversation containing admissions to the rape.

II

Cribas moved to suppress the portion of the recorded statements elicited in the telephone conversation with Luisa relating to the rape, on the ground they violated his Sixth Amendment right to counsel. It was stipulated that, at the time of the taped telephone conversation, counsel had bene appointed to represent Cribas. The court denied the motion and ruled the

statements could be used to impeach Cribas' testimony.

Cribas' primary contention on appeal is that Luisa was acting as an agent of the police and conducting an interrogation at the behest of Officer Caddell. Because he had an attorney at the time and he had invoked his *Miranda*[3] rights when the police attempted to question him, he asserts this government action interfered with his Sixth Amendment right to counsel.

The Attorney General responds that Luisa was not a government agent and Cribas waived his rights when he initiated the telephone call; further, the police action in recording the call was designed to investigate a new crime, i.e., the bribery of a witness.

Cribas' argument is founded upon a line of United States Supreme Court

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[3] *Miranda* v. *Arizona* (1966) 384 U.S. 436.

decisions interpreting the Sixth Amendment, beginning with *Massiah* v. *United States*, *supra*, 377 U.S. 201. The *Massiah* court held that post-indictment communication with an accused, deliberately elicited by a codefendant acting as an agent of the government, interferes with the right to counsel. (*Id.* at p. 206.) Applying this rule in *United States* v. *Henry* (1980) 447 U.S. 264, the court found the government had violated Henry's right to counsel when it deliberately elicited statements through a paid informer who was an inmate at the same jail. Even though the informer had been instructed by the government not to initiate any conversation or ask any question, he had engaged Henry in conversation certain to evoke incriminating statements.

Three factors were highlighted in *Henry*: The informer was acting under

instructions from the government; he was ostensibly no more than a fellow inmate; and Henry was in custody at the time. (*Id.* at p. 270.) The court observed that informers generally have an incentive to produce useful information for the government. And, they can take the defendant unawares because the defendant may say things which he or she would not intentionally reveal to government agents. Moreover, there is a "powerful psychological inducement to reach for aid when a person is in confinement. [Citations.] . . . [T]he mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents." (*Id.* at pp. 270-274.)

These principles were carried a step further in *Maine* v. *Moulton* (1985) 474 U.S. 159, where the represented defendant

initiated a telephone conversation with a codefendant who, unbeknown to Moulton, was cooperating with the state. A meeting was arranged in order to discuss their trial strategy, at which their conversation was recorded. The state maintained there was no interference with the right to counsel, because Moulton had initiated the telephone call and the meeting. The Supreme Court rejected such a distinction, pointing out "the identity of the party who instigated the meeting at which the Government obtained incriminating statements was not decisive or even important to our decisions in *Massiah* or *Henry*." (*Id.* at p. 174.)

The court explained that the Sixth Amendment guarantee "includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. . . . [K]nowing exploitation by

the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to assistance of counsel as is the intentional creating of such an opportunity." (*Id.* at p. 176.)

The prosecution had also asserted the statements were admissible because the police had other, legitimate reasons for recording the conversation: The officers wanted to protect the informer's safety in case Moulton found out he was cooperating with them, and they were attempting to gather information about a new offense he was contemplating. The court held these legitimate interests did not justify the use of unlawfully obtained statements at the trial of those charges for which Moulton was represented by counsel. There was no bar, however, to their use in a

trial of the new offense. (*Id.* at p. 180.)

In *Kuhlmann* v. *Wilson* (1986) 477 U.S. 436, the high court drew the line at statements which were not elicited, but which were overheard by a paid informant placed in the defendant's cell and told to report any incriminating statements. The so-called "listening post" situation marked the first departure from the policy that "the courts must focus on the state's conduct as a whole, rather than on the informant's." (*People* v. *Whitt* (1984) 36 Cal.3d 724, 741.)[4]

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[4] *Whitt* was decided prior to *Kuhlmann* and focuses on whether the informer is acting at the behest of the police or on his or her own initiative. Whether the informer was just listening or questioning the defendant was found irrelevant in *Whitt*. (*People* v. *Whitt*, *supra*, 36 Cal.3d at p. 742.) This is in sharp contrast to *Kuhlmann*, where the police did place the informer in an opportune position, but the informer did nothing but listen. However, the portion of *Kuhlmann* which addresses this issue was not necessary to that decision. It primarily concerned the propriety of the court of appeals entertaining a petition for

With this background, we turn to the facts of the case before us. It is undisputed that Luisa was acting at the behest and encouragement of Officer Caddell to assist him in gathering additional evidence. And, to the extent she was receiving a motel room at taxpayer expense, she was also a paid informant. Indeed, she and Rojas were apparently desperate for a place to live. At oral argument, the Attorney General posited that the consideration they received was not a motivating factor in their cooperation. We disagree. Moreover, it can hardly be claimed that a person claiming to be a victim of a violent crime has no motivation to assist police in gathering evidence to corroborate her allegations. Luisa quite clearly had

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habeas corpus from the prisoner. The Supreme Court found the lower court had acted improperly; it then stated that even if it correctly entertained the petition, it erred in granting *Massiah/Henry* relief.

several incentives to produce useful information.

Turning to the other factors, Cribas, who had no knowledge he was speaking indirectly to the police, had already asserted his right no to incriminate himself. And, of course, he was in custody at the time of the call. Reviewing the substance of the call, Luisa was undeniably eliciting responses and was not simply a passive listener.

The Attorney General contends Cribas initiated the interrogation by voluntarily placing the telephone call.[5] But the same was alleged of the defendant in *Moulton*, who made an unsolicited call, which was recorded, to his codefendant and arranged

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[5] The Attorney General's reliance on *Edwards* v. *Arizona* (1981) 451 U.S. 477 is misplaced. The *Edwards* court held an accused who has invoked *Miranda* rights may not be questioned unless a further conversation is initiated by the accused and there is another admonishment. It is based on the Fifth Amendment, which is not at issue here.

a meeting. The court found the question of who initiated the call was irrelevant. (*Maine* v. *Moulton*, *supra*, 474 U.S. at pp. 174-175.) "It is [] irrelevant to the *Henry* analysis that an accused's statements were voluntarily made. `Since "coercion" is not a Sixth Amendment question, "voluntariness" simply plays no part in the test of admissibility.' [Citation.]" (*People* v. *Whitt*, *supra*, 36 Cal.3d at p. 742.)

And, it cannot candidly be asserted that Cribas voluntarily initiated the call. Cribas had placed one unsolicited phone call the day after the rape during which he did no more than beg Luisa to withdraw the charges. Thereafter, his brother handled the matter. Through him, Rojas and Luisa, at Caddell's insistence, told Danilo to give Cribas her new phone number and have him call her. This was phrased as a condition precedent to any

further discussion of her dropping the charges.

As pointed out in *Henry*, an incarcerated defendant is especially vulnerable to such incentives. The police used Cribas' desperation as a means of circumventing his right to have counsel present at any questioning, a right he had asserted immediately upon his arrest. Thus, even if an initiation argument were available in this context, we would reject it.

In every sense, the police deliberately created the setting and led Cribas into it. Surreptitious questioning was conducted at their request about a matter on which counsel had been appointed.

Next, the Attorney General argues the police were investigating a new crime and were therefore not interfering with the right to counsel for the offense on which

Cribas was represented. We would readily agree if it were not for the fact Caddell specifically instructed Luisa to obtain an admission from Cribas that he had raped her. Caddell testified one of his purposes was to obtain corroboration *of the rape*. Defense counsel's motion in the lower court was directed only at the first portion of the phone call, which contained damaging admissions about the rape; no effort was made to challenge the latter half, in which Cribas negotiated with Luisa for his release. The portion concerned with the admission of rape could readily have been exercised without threatening the evidence of the new crime. In fact, during the trial, only the portion of the tape relating to the bribery charge was admitted in the prosecution's case in chief; the remainder was introduced only as impeachment of Cribas' testimony.

Thus, we must determine whether statements obtained in violation of *Massiah* may be used to impeach the testimony of a defendant. In *People* v. *Harper* (1991) 228 Cal.App.3d 843, the court concluded they could not, distinguishing the recent United States Supreme Court decision in *Michigan* v. *Harvey* (1990) ___ U.S. ___, 110 S.Ct. 1176. The *Harper* court summarized *Harvey* as holding that "a statement taken in violation of `only a prophylactic rule' may be used for impeachment purposes. It does not, however, follow that a statement taken in violation of the Constitution may be used for impeachment purposes." (*Harper*, *supra*, at p. 851.) The court agreed that violations of prophylactic rules designed to ensure knowing and intelligent waivers were not a bar to use of illegally obtained statements for impeachment where the problem is an

imperfect waiver. However, it found these rules have "little application where there is no question of waiver. The statement, taken after appellant was indicted, and without any waiver of his right to counsel, simply and unequivocally violated the Sixth Amendment." (*Id.* at p. 852.)

Nor is the fact the statements were otherwise voluntary dispositive. Voluntariness is the sine qua non in a Fifth Amendment challenge because there is no Fifth Amendment violation where statements are voluntary. But "[a] purportedly voluntary statement violates the Sixth Amendment if it is secured after a defendant had asserted the right to counsel and without any waiver of that right. Accordingly, in Sixth Amendment cases the question of voluntariness is not dispositive." (*Id.* at p. 853.) Thus, in both Fifth and Sixth Amendment cases, the determinative factor is not whether the

statements were voluntary or involuntary, but whether they were on [sic] were not obtained in violation of the constitution. We have already determined the statements in this case were.

In determining whether Cribas was prejudiced by the admission of evidence obtained from a *Massiah* violation, the harmless error test of *Chapman* v. *California* (1967) 386 U.S. 18 applies. (*Milton* v. *Wainwright* (1972) 407 U.S. 371, 372.) As is typical in rape cases, the evidence consisted primarily of testimony by the accused and the victim. The statements made by Cribas during the telephone conversation acknowledged culpability, but tempered the admission with remarks that he was drunk and did not know what he was doing:

> "L.B.: You don't know what you did?
> "C.C.: Uh, huh (Affirmative)
> "L.B.: But, you did it.

"C.C.: Yes, that is why I'm telling you because when one is very drunk one does not know what he is doing. Since Friday, I was drinking and INAUDIBLE

"L.B.: But you do admit that you did it?

"C.C.: Huh? (What?)

"L.B.: You do accept the fact that you did rape me?

"C.C.: Uh, huh (Affirmative) Well, I accept it."

The admission that he raped Luisa and accepted responsibility for it are no less damaging because of his drinking. Rape is a general intent crime, and intoxication is not a defense unless it rises to the level of unconsciousness. And, Cribas tendered an apology to Rojas for his conduct during his phone call. That statement, which contained similar incriminating material, was properly before the jury. However, this was readily explained in the context of Cribas' defense that Rojas and Luisa were lying because they had set him up in an attempt to extort him.

While counsel gamely argued the recorded statements were made in order to tell Luisa whatever she wanted to hear, there is no denying that a recorded statement containing his concession of guilt was damaging to his defense. Moreover, this is not a case where other physical or testimonial evidence combined to produce an overwhelming case.

Looking at the conduct of the jury, it did not arrive at its verdicts until after deliberating for approximately nine hours over a two-day period. During that time, it requested rereading of Luisa's testimony regarding the day of the rape and sought guidance on the conspiracy instruction. The entire trial, even though conducted through interpreters, lasted only slightly more than two days. Apparently, the jury did not view its decision as clear cut. We cannot say beyond a reasonable doubt that the jury

would have reached the same verdict on the rape count in the absence of these admissions.

Thus, upon retrial, the prosecution may not use Cribas' statements relating to the rape, which we quote in footnote 2, *ante*, against him in any manner.[6]

III

Cribas contends there is no evidence supporting the jury's conclusion he committed an act specified within section 137, subdivision (a), which provides that any person who "gives or offers, or promises to give, to any witness, person about to be called as a witness, or person about to give material information pertaining to a crime to a law enforcement

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[6] We therefore need not reach Cribas' argument, that the statements to Luisa were involuntary. That issue is directed to the same portion of the recorded conversation. Similarly, we do not reach Cribas' contention that the court erred in denying his request to instruct the jury to disregard the same statements if it found them the product of coercion.

official, any bribe, upon any understanding or agreement that the testimony of such witness or information given by such person shall be thereby influenced is guilty of a felony." The information alleged Cribas offered money to Rojas and Luisa to influence their testimony or the information they provided to the police.

Cribas asserts the evidence establishes he did nothing more than ask Luisa to drop the charges. The Attorney General does not appear to contest this characterization of the evidence, but argues "it would be ludicrous to conclude that an agreement to get the witness `to drop' a case does not reasonably mean `to influence a witness not to testify.'" He points out because Luisa did not have the authority to dismiss the case, the only way she could drop the charges was by

refusing to testify. However, he points to no evidence Cribas knew that.

Cribas cites *Lichens* v. *Superior Court* (1960) 181 Cal.App.2d 573 which, as he asserts is strikingly similar to the instant case. Lichens had repeatedly offered to pay his attempted rape victim $500 to "drop the case." He was charged with bribery of a witness under former section 136 1/2 (amended and renumbered as § 138).[7] The appellate court issued a writ of prohibition, observing that using money to induce the victim to "drop the

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[7] The only apparent difference between section 138, subdivision (a) and section 137, subdivision (a) is the former prohibits bribing "upon any understanding or agreement that the person shall not attend upon any trial or other judicial proceeding," or attempting to dissuade such attendance. Section 137, subdivision (a) prohibits giving or offering to give a bribe under agreement or understanding that it will influence the testimony of a witness or information given to law enforcement.

Cribas was originally also charged with violating section 138, subdivision (a) and section 136.1, subdivision (c)(2). During the trial the court dismissed those counts pursuant to section 1118.1.

charge" was not unlawful because only the district attorney could consent to a dismissal. Moreover, it was not the equivalent of inducing her not to attend the trial. (*Id.* at p. 576.)

The Attorney General relies on *People* v. *Pic'l* (1982) 31 Cal.3d 731. In *Pic'l*, the defendant drafted a document in which the victim agreed to "'seek dismissal of all criminal charges which may have been filed . . . and to do everything within my power to prevent the filing of any additional charges against any person.'" He also agreed to "'refuse to prosecute criminal charges against anyone.'" The Supreme court held it was reasonable for the grand jury to have concluded that non-attendance was within the scope of the agreement "to 'do everything within my power'" and his agreeing to "'refuse to prosecute'" reasonably contemplated refusing to testify. (*Id.* at p. 740.)

While not directly disapproving *Lichens*,[8] the court distinguished it by noting the victim in *Pic'l* had a greater burden in fulfilling his agreement: "he had to `refuse to prosecute' and `do everything' to prevent further charges. Absenting himself from trial would have been an obvious means of keeping the bargain." (*Id.* at p. 741.) The court concluded an indictment under former section 136 1/2 "may be supported by an inference, based on the defendant's words or actions, that he has violated the statute; no express statement by the defendant of his intent to prevent the witness' testimony is required." (*Ibid.*)

Applying these principles, the instant case more closely resembles the

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[8] The Supreme Court expressly declined to reach the issue of the continued viability of *Lichens* in the face of the subsequent amendment of Penal Code section 136 1/2. (*Id.* at p. 741, fn. 4.) We are not confronted with the distinction between the old and new versions of the statute.

facts in *Lichens*. Here, too, Cribas did no more than ask Luisa to drop the charges. She testified that during their first telephone conversation, he said he could not continue to help them while in jail and that his attorney would handle having the charges dropped. In their recorded telephone conversation, Cribas again asked Luisa repeatedly to help him get out of jail and once referred to her dropping the charges, but insisted he did not have the money she wanted. Asking her to withdraw the charges is no more the equivalent of influencing her testimony than it is of inducing her not to attend the trial.

However, assuming *Lichens* was correctly decided, Cribas gains little solace from this conclusion, because there is other evidence, not cited by either party, which it sufficient for conviction. Rojas testified that in one of his

conversations with Danilo, Danilo suggested he say that on the day of the incident Rojas was drunk, had hit Luisa, and that she suffered from "nervousness" and did not know what had happened.

Because Cribas and Danilo were established as conspirators, Danilo's statements are attributable to Cribas for purposes of the substantive offense. (*People* v. *Brawley* (1969) 1 Cal.3d 277, 289.) In fact, the jury was instructed with CALJIC No. 6.11, relating to joint liability for statements or acts of conspirators.[9] It would have been well

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[9] "Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if said act or said declaration is in furtherance of the object of the conspiracy. [¶] The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators. [¶] A member of a conspiracy is not only guilty of the particular crime that to [his] [her] knowledge [his] [her] confederates are contemplating committing, but is also liable for the natural and probable consequences of any act of a co-conspirator to further the object of the

within reason for the jury to attribute Danilo's statements to Cribas.[10]

These words and Danilo's subsequent action in delivering the money lead to a reasonable inference that the objective was to persuade Rojas and Luisa to falsify a statement to the police or in court about the rape. There was substantial evidence to support the conviction.

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conspiracy, even though such act was not intended as a part of the original plan and even though [he] [she] was not present at the time of the commission of such act. . . ."

[10] Notably, the jury, in its verdict on the conspiracy charge, specifically found conspiracies to commit *both* sections 137, subdivision (a) and 136.1, subdivision (b). The latter section prohibits attempting to "prevent or dissuade another person who has been the victim of a crime or who is witness to a crime" from pursuing a variety of legal actions. Cribas had originally been charged with this offense but the prosecutor, in midtrial, dismissed this count at the same time as the section 138 allegation, choosing instead to proceed by interlineating a section 137, subdivision (a) charge. Under the circumstances, the dismissal of the section 136.1, subdivision (b) charge may have been ill-advised.

IV

Cribas asserts reversal of his rape conviction requires reversal of the bribery and conspiracy convictions. He claims if no crime occurred, neither Luisa nor Rojas fit the definition of a "person about to be called as a witness" to a crime under the bribery statute. Because of the erroneous admission of the statements, he continues, the jury found him guilty of rape without properly considering this issue.

CALJIC No. 7.03, as read to the jury, defined the phrase as follows: "A `person about to be called as a witness' includes: [any person who knows or who has been told that [he] or [she] will be called as a witness] or [any person who is a material witness to the issues of a case which already has been filed or which thereafter may be filed] or [any person about to give material information pertaining to a crime

to a law enforcement official.]" Cribas points out the phrase "pertaining to a crime," in the third alternative bracketed definition, may have been the one upon which the jury settled. He interprets this phrase as requiring a crime which was actually committed.

This interpretation has utterly no legal or logical basis. The gravamen of the offense is the influencing of information given by someone who is or will be involved in legal proceedings. Whether the witness's original accusation is actually true is irrelevant, as is the result of the legal proceeding and whether the witness intends to carry out the agreement to testify falsely. (*People* v. *Pic'l*, *supra*, 31 Cal.3d at p. 739.)

As the Attorney General explains, the underlying crime need not be prosecuted. And, if there is a prosecution and the evidence proves insufficient for

conviction, the offence of bribery is not diminished. There is nothing in the phrase "pertaining to a crime" from which we must conclude it means a crime which has *actually* been committed. More to the heart of the matter, even an acquittal does not mean a crime did not occur; it simply relieves the defendant of culpability.[11]

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[11] The defense argument, taken to its logical conclusion, would mean a person who bribed a witness could not be prosecuted if acquittal on the underlying charge results from the suborned perjury.

V

Cribas objects to the failure of the court to instruct, sua sponte, pursuant to CALJIC No. 17.01, that the jury had to agree unanimously on the overt act or acts underlying the conspiracy charge or on the definition of a witness set forth in CALJIC No. 7.03 (see section IV, *ante*). There was no error.

We are persuaded that a specific unanimity instruction on overt acts was not required: "Inasmuch as the overt act, though required to establish the existence of a conspiracy, it not an actual element of the crime, it follows that the jury need only be unanimous in finding *an* overt act was done in furtherance of the conspiracy, not in finding a particular act was done. . . . Hence, the overt at is part of the `theory' of the case, not an act constituting the offense. [Citation.] For the foregoing reasons, .

. . a trial court need not instruct the jury they must unanimously agree as to the overt act done in pursuance of a conspiracy." (*People* v. *Jones* (1986) Cal.App.3d 509, 516.) Cases taking a contrary position have done so in dicta, with which we disagree. (*People* v. *Ramirez* (1987) 189 Cal.App.3d 603, *People* v. *Brown* (1991) 226 Cal.App.3d 1361.)

CALJIC No. 6.10 and 17.50 sufficiently apprised the jury of its duties. CALJIC No. 6.10 told the jury that proof of a conspiracy requires proof of at least one overt act. CALJIC No. 17.50 advised that all 12 jurors had to agree on a decision and to any findings in their verdict. "These most specific instructions must be viewed in conjunction with the unqualified requirements that proof be made beyond a reasonable doubt as to each element of an offense and that the verdict be unanimous.

There is no inadequacy in the instruction given." (*People* v. *Skelton* (1980) 109 Cal.App.3d 691, 717.)

For much the same reason, the CALJIC 17.01 instruction was not required for the definition of a "person about to be called as a witness." This constitutes a theory of guilt, on which a jury need not be specifically instructed they must agree. (*People* v. *Failla* (1966) 64 Cal.2d 560, 569.)

As to the rape count, the judgment is reversed. Accordingly, the matter is remanded for resentencing on the bribery and conspiracy convictions. In all other respects, the judgment is affirmed.

CERTIFIED FOR PUBLICATION.

s/SONENSHINE
SONENSHINE, ACTING P. J.

I CONCUR:

CROSBY, J.

WALLIN, J.

APPENDIX B

APPENDIX B

Fourth Appellate District,

[Filed September 26, 1991]

Division Three,

No. G009230

S022217

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v.

CESAR ELIAS CRIBAS, Appellant

Petitions for review DENIED.

LUCAS
Chief Justice

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

DANIEL E. LUNGREN
Attorney General of
the State of California
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110 West A Street, Suite 700
San Diego, California 92101

No. October Term, 1991

THE STATE OF CALIFORNIA,

Plaintiff,

v.

CESAR ELIAS CRIBAS,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within PETITION FOR WRIT OF CERTIORARI as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty-one (41) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Clerk, California Supreme Court
3580 Wilshire Blvd.
Los Angeles, California 90010

Charles R. Khoury, Jr.
Attorney at Law
P. O. Box 1066
Wilton, N.H. 03086

Court of Appeal
Fourth Appellate District, Division 3
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Santa Ana, CA 92701

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Dated at San Diego, California, December 16, 1991.

Arlene M. Ryan
ARLENE M. RYAN

Subscribed and sworn to before me
this 16th day of December 1991.

Anne Marie Buford
Notary Public in and for said County and State

ANNE MARIE BUFORD
Notary Public—California
County of San Diego
My Commission Expires: 11/19/93

ORIGINAL

(3)

Supreme Court, U.S.
FILED
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No. 91-996

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

RECEIVED
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SUPREME COURT, U.S.

PEOPLE OF THE STATE OF CALIFORNIA PETITIONER

vs.

CESAR ELIAS CRIBAS RESPONDENT

ON WRIT OF CERTIORARI

TO THE COURT OF APPEAL FOURTH APPELLATE DISTRICT DIVISION THREE OF THE STATE OF CALIFORNIA

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

WITHOUT AFFIDAVIT OF INDIGENCY

The respondent, Cesar Cribas, asks leave, through his appointed counsel Charles R. Khoury Jr., to file the attached Brief in Opposition to Petition for a Writ of Certiorari without prepayment of costs and to proceed in forma pauperis without an affidavit of indigency.

Respondent has been previously granted leave to so proceed in

the Superior Court, the Court of Appeal and the Supreme Court of the State of California.

The affidavit of respondent, who lives 3,000 miles from his present attorney, will be provided as soon as it is received from him.

Charles R. Khoury Jr.

Attorney for Respondent

No. 91-996

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

PEOPLE OF THE STATE OF CALIFORNIA PETITIONER

vs.

CESAR ELIAS CRIBAS RESPONDENT

ON WRIT OF CERTIORARI

TO THE COURT OF APPEAL FOURTH APPELLATE DISTRICT
DIVISION THREE OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS. i

TABLE OF AUTHORITIES ii

REQUEST FOR RULE 15 WAIVER. 1

STATEMENT OF FACTS..... . .2

RESPONSE. 3

1. THE STATEMENTS WERE NOT "OTHERWISE VOLUNTARY AND TRUSTWORTHY."

2. ON THIS RECORD, RESPONDENT'S CONFESSION, SECURED IN VIOLATION OF HIS RIGHT TO COUNSEL, RENDERED IT INADMISSIBLE FOR ALL PURPOSES INCLUDING IMPEACHMENT. 4

3. INDEPENDENT STATE GROUNDS WERE RELIED UPON BY THE STATE COURT OF APPEAL DECISION IN THIS CASE.

. 5

.CONCLUSION..... . . .7

APPENDIX "A" ATTACHED PAGES OF REPORTER'S AND CLERK'S TRANSCRIPT.

TABLE OF AUTHORITIES

CASES

	PAGE
Bunnell v. Superior Court (1975) 13 Cal.3d 592,601	.6
New Jersey v. Portash (1979) 440 U.s. 450.	5
People v. Gonyea (1984) 365 N.W2d 136.	.5,6
People v. Whitt (1984) 36 Cal.3d 724.	.6
United States V. Henry (1980) 447 U.S. 264.	3

REQUEST FOR WAIVER OF RULE 15 APPLICATION

This opposition is provided to assist this Court in deciding whether to grant or deny the petition filed in this case. It is not timely since counsel has 1) been involved in preparing four lengthy appeals, all involving murder and /or kidnap and 2) has had an extended bout of flu. Counsel requests the Court to waive the application of Rule 15 and to consider the opposition before deciding to grant or deny the petition for writ of certiorari in this case.

STATEMENT OF FACTS

Respondent relies on the Statement of Facts as they appear in the Court's opinion below which is attached to the Petition for Writ of Certiorari. Factual errors which appear in the Petition are:

At page 16, the petition erroneously states that the trial court "ruled the statements obtained could be used by the prosecution for impeachment purposes." The petition cites page 276 of the Clerk's Transcript and page 53 of the Reporter's Transcript. Those pages are attached to this Opposition and clearly show that the trial court did not exercise any discretion to limit his ruling to impeachment. The prosecution was allowed, by the judge's ruling, to use the taped statements of respondent for any purpose it wished. The statements were admitted into evidence during the prosecution case-in-chief, with the understanding respondent would testify and the taped statements would be used to impeach him on either cross-examination or rebuttal. (RT 313.)

RESPONSE

1. THE STATEMENTS WERE NOT "OTHERWISE VOLUNTARY AND TRUSTWORTHY."

2. ON THIS RECORD, RESPONDENT'S CONFESSION, SECURED IN VIOLATION OF HIS RIGHT TO COUNSEL, RENDERED IT INADMISSIBLE FOR ALL PURPOSES INCLUDING IMPEACHMENT.

3. INDEPENDENT STATE GROUNDS WERE RELIED UPON BY THE STATE COURT OF APPEAL DECISION IN THIS CASE.

ARGUMENT

I

THE STATEMENTS OF RESPONDENT WERE NOT "OTHERWISE VOLUNTARY AND TRUSTWORTHY" ON THEIR FACE.

The government involvement in the securing of the taped phone conversations in this case was nothing short of the overreaching condemned by this Supreme Court in United States v. Henry (1980) 447 U.S. 264, 274. After respondent was jailed and appointed counsel, the police specifically asked Luisa to question respondent about the rape after they placed her in a motel room at police expense. Petitioner concedes this was a violation of the Sixth Amendment (fn. 5 p. 20 of the petition.)

Petitioner states at page 35 of the petition that even though the statements were taken in violation of the Sixth Amendment, they were "otherwise voluntary and trustworthy."

A simple reading of the Court of Appeal opinion attached to

the petition shows this not to be so. In the taped conversation set forth in the opinion, Luisa tells respondent that she will help him get out of jail only if he tells her why he raped her.(Petition, A7-A9.)

On their face these statements, amounting to his confession, cannot be considered voluntary and trustworthy to use for any purpose, including impeachment.

II

ON THIS RECORD, RESPONDENT'S CONFESSION, SECURED IN VIOLATION OF HIS RIGHT TO COUNSEL, RENDERED IT INADMISSIBLE FOR ALL PURPOSES INCLUDING IMPEACHMENT.

In People v. Gonyea (1984) 365 N.W2d 136 , the Supreme Court of Michigan was faced with an obvious Sixth Amendment violation when police officers gained incriminating statements from the defendant after his sentencing and without his attorney's permission. That court held:

> [T]he right to counsel both ensures the defendant an adequate defense against all forces of the state, and ensures the practical enjoyment of many other rights accorded a defendant. Thus any transgression of this right not only leaves the defendant vulnerable or helpless against the system but jeopardizes the realization of other rights.

People v. Gonyea supra at p. 144.

The Supreme Court of Michigan held the statements unusable by the state for any purpose including impeachment. The court went on to speak directly to the issue of "condoning perjury".

> In support of this position we have just taken, we note that the right to counsel has also been argued to be of such fundamental importance that it was unnecessary for us to even balance the violation of this right against condoning perjury.

Id. at p. 144.

The court then discussed New Jersey v. Portash, (1979) 440 U.S. 450. In that case, immunized, compelled testimony was used to impeach the defendant at his trial. This Supreme Court reversed as this violated "the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible." (Id. at-458-459.)

The Michigan court held that, by analogy, they were confronted with the right to counsel "in its most pristine form" and refused to balance the need to prevent unlawful police conduct against the need to prevent perjury. People v. Gonyea supra at p. 143.

In the instant case, when one is incarcerated awaiting trial and has counsel, as did respondent, the violation of that right to counsel in the manner done here is as egregious as the constitutional violation of Portash supra. Respondent had to feel compelled to give Luisa the answer she wanted.

The same analogy and the same result should and did obtain in the state court of California, namely the refusal of that court to condone use of the confession for any purpose including impeachment of respondent.

III

INDEPENDENT STATE GROUNDS WERE RELIED UPON BY THE STATE COURT IN THIS CASE.

The state court in the instant case relied upon People v. Whitt (1984) 36 Cal.3d 724, a California Supreme Court case involving a Sixth Amendment deprivation. That case in turn held that due to the identity of the Sixth Amendment with article I section 15 of the California Constitution, all references to the Sixth Amendment would be deemed references to article I section 15. (People v. Whitt supra at fn.8.)

People v. Gonyea supra at pp.144-145, relies on independent state grounds for its holding. (Cf.Bunnell v. Superior Court (1975) 13 Cal.3d 592, 601, California courts look to both Fifth Amendment and California constitution in construing double jeopardy claim.)

Since independent state grounds exist for the state court decision in this case, in the form of article I section 15, certiorari should be denied on this point alone.

CONCLUSION

The statements amounting to a confession were not otherwise voluntary and trustworthy: they were concededly secured in violation of a constitutional right to counsel; independent state grounds exist to prevent their use for impeachment.

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Charles R. Khoury Jr

Attorney for Respondent Cribas

APPENDIX "A"

I GUESS IT BOILS DOWN TO THIS: TO WHAT EXTENT MUST WE GO TO, YOU KNOW, SAVE PEOPLE FROM THEMSELVES AND THEIR OWN POOR JUDGMENT.

WITH RESPECT TO THE STATEMENTS THEMSELVES, I'VE READ THE TRANSCRIPT AND I'M AWARE THAT THE OFFICER TOLD HER, YOU KNOW, CERTAIN QUESTIONS TO ASK, CERTAIN THINGS TO INQUIRE INTO, BUT HE DIDN'T PUT THE PHONE IN THE DEFENDANT'S HAND AND HE DIDN'T PUT THE ANSWERS -- HE DIDN'T PUT THE ANSWERS IN HER MOUTH EITHER.

AND WHEN YOU'RE TALKING ABOUT A BRIEF RELATING TO A PENDING CHARGE, I DON'T THINK IT'S INAPPROPRIATE TO, UNDER THESE CIRCUMSTANCES, TO MAKE SURE THAT WE'RE TALKING ABOUT THE SAME CHARGE, THE FACTS UNDERLYING THE SAME CHARGE. IF FOR NO OTHER REASON TO DETERMINE THE VALIDITY OF THAT CHARGE AS IT MAY IMPACT THE BRIDE ATTEMPT.

FURTHERMORE, IF YOU LOOK AT THE -- IF YOU READ THE TRANSCRIPT IN ITS ENTIRETY, I DON'T THINK THAT OVERALL -- IT'S OBVIOUSLY NOT HELPFUL TO THE DEFENDANT, BUT DEPENDING ON ONE'S POINT OF VIEW, THE INITIAL QUESTIONS AND THE DEFENDANT'S ANSWERS TO THE QUESTIONS IN THE INITIAL PORTION OF THE TAPE ARE NOT UNEQUIVOCAL. THEY ARE AMBIGUOUS AND ALSO OBVIOUSLY IN RESPONSE TO QUESTIONS THAT ARE QUITE -- AND I THINK THAT -- TO PUT IT THIS WAY, I THINK THERE'S A LITTLE GOLD IN THERE FOR EVERYBODY.

BEST AVAI

AND LOOKING AT THEM AS A WHOLE, THE LATER PORTIONS THAT ARE VIRTUALLY UNDISPUTED ARE COMING IN. I REALLY DON'T SEE THAT THE DEFENDANT IS HARMED BY THE FIRST PORTION COMING IN IN LIGHT OF THE NATURE OF THE ANSWERS THAT WERE GIVEN OR THE MANNER IN WHICH THEY WERE GIVEN. CONSEQUENTLY YOUR MOTION TO SUPPRESS THE STATEMENTS BASED ON VIOLATION OF DEFENDANT'S RIGHT TO COUNSEL IS DENIED.

MR. ROZENBERG: DOES THE COURT WANT AN OFFER OF PROOF WITH RESPECT TO THE STATEMENTS OF CONSPIRACY?

THE COURT: RIGHT. YOU WERE GOING TO PROVIDE THAT.

MR. ROZENBERG: BASICALLY AS AN OFFER OF PROOF WHAT THE PEOPLE EXPECT THE EVIDENCE IS GOING TO BE IS THAT THE DAY SUBSEQUENT TO THE RAPE -- THE RAPE WAS ON A SATURDAY -- THAT NEXT SUNDAY THE DEFENDANT CALLED THE VICTIM AT HER HOME OFFERING HER MONEY IN EXCHANGE FOR HER HELP IN EXCHANGE FOR HIS RELEASE.

THE COURT: THE DEFENDANT OR CODEFENDANT?

MR. ROZENBERG: THE DEFENDANT LATER ON THAT DAY.

THE COURT: THAT WAS WHAT DAY?

MR. ROZENBERG: SUNDAY, THE DAY AFTER, APRIL 2ND.

THE NEXT DAY OR -- EXCUSE ME, LATER ON THAT DAY THE BROTHER, THE CODEFENDANT, ARRIVES AND DISCUSSES WITH THE VICTIM'S HUSBAND HELP AND MONEY IN EXCHANGE FOR THE RELEASE OF THE DEFENDANT.

ABLE COPY

BEST AVAILABLE COPY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

40

Dept

Court convened at 9:00 a. M November 15 19 89 present

Hon RICHARD J. BEACOM Judge Kay Mason Deputy Clerk

Jack Quinn Bailiff Crystal Koelle Reporter

and the following proceedings were had

C-74030 PEOPLE VS CRIBAS, Cesar Elias Madrid

In open court at 8:54 a.m. out of the presence of the jury. Defendant present with Deputy Public Defender Denise Gragg and interpreter Richard Antone Simmons. People represented by Deputy District Attorney Marc Rozenberg. Defendant's motion to suppress all of the telephonic taped conversation contained in Court Exhibit 1 on the grounds that it contained involuntary statements is denied. Defendant's motion to suppress the Defendant's admission regarding the rape on the grounds that the Defendant had a right to counsel is denied. Defendant's motion to exclude all statements made by Danilo Cribas on the grounds that it is hearsay is denied; the statements will come in subject to a motion to strike. Jury now present in their proper places at 9:24 a.m. Juror #5, Peggie A. Swanson, changes seats with juror #10, Bill Comer. Openine statement by People. Opening statement by Defendant. Luisa Brito was sworn and testified with the assistance of interpreter Anita Prieto. Diagram of aparatment marked People's Exhibit 1 for Identification. The Court admonished the jury and declared a brief recess. Defendant remanded to custody. Again in open court at 11:05 a.m. Defendant present with counsel and interpreter. People duly represented. Jury present. Luisa Brito resumed testimony with the

(continued on page two)

Charles R. Khoury Jr.
P.O. Box 1066
Wilton N.H. 03086

CASE NUMBER: 91-996

DECLARATION OF SERVICE

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of Hillsborough N.H. in which the mailing occurred and am not a party to the subject cause. My business address is P.O. Box 1066 Wilton, New Hampshire. I served the OPPOSITION TO PETITION FOR WRIT OF CERTIORARI as follows: Original and " copies to the Hon. William K. Suter, Clerk of the Supreme Court of the United States, One First Street NE, Washington D.C. 20543 of which a true and correct copy of that document was mailed to each addressee in a separate envelope named as follows:

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I declare under penalty of perjury the above statement is true.
Executed at Wilton N.H. on Feb. 18, 1992.

CRK

Charles R. Khoury Jr.

6

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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CESAR ELIAS CRIBAS,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

ARGUMENT

I. THE PETITION CONTAINS NO FACTUAL ERROR AND PRESENTS A SUBSTANTIAL FEDERAL QUESTION PROPERLY RAISED IN THE STATE COURT 1

II. THE STATE COURT DECISION RESTS ON FEDERAL LAW 6

III. RESPONDENT'S INSISTENCE THAT EVIDENCE OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT IS INADMISSIBLE FOR ALL PURPOSES, INCLUDING IMPEACHMENT, AND HIS RELIANCE ON MICHIGAN CASE LAW, DOES NOTHING MORE THAN CONFIRM THE FACT THAT THE ISSUE WARRANTS CERTIORARI REVIEW 14

IV. THIS COURT MAY INDEPENDENTLY REVIEW FACTS THAT ARE INTERMINGLED WITH LEGAL CONCLUSIONS WHEN DECIDING A SUBSTANTIAL FEDERAL QUESTION 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASE	Page
Ashcraft v. Tennessee, 322 U.S. 143 (1944)	19
Blackburn v. Alabama, 361 U.S. 199 (1960)	19
California v. Carney, 471 U.S. 386 (1985)	11
California v. Ramos, 463 U.S. 992 (1983)	14
Chambers v. Florida, 309 U.S. 227 (1940)	19
Chapman v. California 386 U.S. 18 (1967)	9
Coleman v. Thompson ___ U.S. ___, 115 L.Ed.2d 640, 59 U.S.L.W. 4789 (1991)	12
Fiske v. Kansas, 274 U.S. 380 (1927)	19
Haynes v. Washington, 373 U.S. 503 (1963)	19
Martinez v. United States, 566 A.2d 1049 (D.C. App. 1989)	16
Massiah v. United States, 377 U.S. 201 (1964)	1, 4, 7, 9
Michigan v. Harvey, 494 U.S. ___, 108 L.Ed.293, 110 S.Ct. 1176 (1990)	5, 8

Michigan v. Long,
463 U.S. 1032 (1983) 11, 12

Mincey v. Arizona,
437 U.S. 385, (1978) 18

Napue v. Illinios,
360 U.S. 264 (1958) 19

Orr v. Orr,
440 U.S. 268 (1979) 13

People v. Bacino,
41 Ill.App.3d 738,
354 N.E. 2d 641 (1976) 16

People v. Cribas,
231 Cal.App.3d 596,
282 Cal. Rptr. 538 (1991) 13

People v. Gonyea,
421 Mich. 462,
365 N.W.2d 136 (1984) 14, 15

People v. Harper,
228 Cal.App.3d 843,
29 Cal. Rptr. 204 (1991) 12, 13

People v. Ricco,
56 N.Y.2d 320,
437 N.E.2d 1097 (1982) 16

People v. Whitt
36 Cal.3d 724,
205 Cal. Rptr. 810 (1984) 7, 9, 10

State v. Swallow,
405 N.W.2d 29 (S.D. 1987) 16

State v. Thomas,
698 S.W.2d 942 (Mo.App. 1985) 16

Stein v. New York,
346 U.S. 156 (1953) 18

Tate v. United States,
283 F.2d 377 (1960) 16

United Air Lines v. Mahin,
410 U.S. 623 (1973) 13

United States v. Brown,
699 F.2d 585 (2d Cir. 1983) 15

United States v. Frank,
520 F.2d 1287 (2d Cir. 1975) 16

United States v. McManaman,
606 F.2d 919 (10th Cir. 1979) 16

Washington v. Chrisman
455 U.S. 1 (1982) 9

CONSTITUTIONS

United States Constitution
Fourth Amendment 16
Fifth Amendment 16
Sixth Amendment et passim

STATUTES

28 United States Code
§ 1257, subd. (a) 6

ARGUMENT

I

THE PETITION CONTAINS NO FACTUAL ERROR AND PRESENTS A SUBSTANTIAL FEDERAL QUESTION PROPERLY RAISED IN THE STATE COURT

The Brief in Opposition to the Petition for Writ of Certiorari states that the Petition contains factual error. Respondent attaches pages from the reporter's and clerk's transcript, taken out of context, in an attempt to cast doubt on the adequacy of the state court record. (RB 2.) The petition contains no factual error and presents a substantial federal question properly raised in the state court.

Initially, respondent sought to suppress the statements made by him in a taped telephone call as obtained in violation of the Sixth Amendment right to counsel and Massiah v. United States, 377 U.S. 201 (1964). (CT 254-260.) However, at the hearing on the motion, the

prosecution made clear that it was proffering those statements solely for purposes of impeachment, should respondent testify. (See RT 18-19; see also, state court opinion at, Appen. to Pet. A-11, A-12.)

Specifically, when questioned by the trial court, the prosecutor stated:

> ". . . [W]e're not seeking to admit them in . . . the prosecution's case in chief. The People however don't feel that they should be precluded from using these statements on either cross-examination or rebuttal should the defendant testify. [¶]
>
> "It's the People's position that even if the statements are excluded under the 6th Amendment, that based upon the history of the courts in determining that [sic] exclusionary remedy really only affects statements being used in the People's case in chief, that the court should allow the People, should the defendant testify, to either impeach him with those statements or present those statements in rebuttal.
>
> "However, if [the court finds] they were involuntary, the court would have to make a finding -- it's the People's position the court would have to

> find [in such a case] those statements . . . [are] not usable [sic] for any purpose." (RT 18-19.)

Subsequently, respondent's motion was denied and the court ruled the statements were admissible. The trial court found the statements were voluntarily made and not taken in violation of the Sixth Amendment. (See CT 276, see also, Appen. to Pet. A-11, A-12.) The statements were thereafter employed by the prosecution solely to impeach respondent when he testified. (RT 301-302.)[1]

---

[1] We note further that, in the prosecution's case-in-chief, the tape recording and the transcript of the tape recording were marked as exhibits and were admitted for purposes of later impeachment. However, and as the prosecutor stated, in the event, respondent did not testify, or there was an absence of evidence presented in the defense which would warrant use of the statements on rebuttal, the statements made by respondent pertaining to the rape charge would be deleted from the tape and transcript of the tape, because the statements were being admitted solely for impeachment purposes. (RT 313; see also, Appen. to Pet. A-22.)

In the California Court of Appeal, Fourth Appellate District, Division Three, respondent contended statements he made to the victim were obtained in violation of the Sixth Amendment to the federal Constitution and Massiah v. United States, supra, 377 U.S. 201, and were accordingly improperly admitted. Petitioner argued that respondent's statements were not obtained in violation of the Sixth Amendment and, in any event, the evidence was appropriately admitted for impeachment.

On June 21, 1991, in a published opinion, the California Court of Appeal reversed respondent's forcible rape conviction, holding that respondent's statements were obtained in violation of the Sixth Amendment to the Constitution, and such illegally obtained evidence could not be used for any purpose including for

the purpose of impeachment.[2] (Appen. to Pet. A-23, citing Michigan v. Harvey, 494 U.S. ___, 108 L.Ed.293, 110 S.Ct. 1176 (1990), see also, Appen. to Pet. A-24, A-25.)

Thereafter, petitioner filed a petition for review in the California Supreme Court, the state's highest court, arguing that the Court of Appeal improperly held as a matter of law that statements obtained in violation of the Sixth Amendment cannot be used for impeachment purposes. Petitioner further argued that under Michigan v. Harvey, supra, 494 U.S. ___, 108 L.Ed.2d 223, respondent's statements could properly be used against him for impeachment purposes, and the exclusionary rule should not bar

---

[2] It should be noted the court iterated the sought and admitted purpose was indeed for impeachment. (Appen. to Pet. A-11, A-12, A-22.)

the use of illegally seized evidence to impeach a criminal defendant.

On September 26, 1991, the California Supreme Court denied the petition for review, making the decision of the Court of Appeal a final judgment under 28 U.S.C. section 1257, subdivision (a), for purposes of seeking this Court's certiorari jurisdiction.

The petition for writ of certiorari, filed with this Court, contains no factual misstatement or error. Instead, the petition presents a substantial federal question, which was properly raised in the state court.

II

THE STATE COURT DECISION RESTS ON FEDERAL LAW

Respondent misleads this Court by erroneously stating the state court decision in the instant case rests on independent state grounds; he bases his argument on a citation by the state court

to People v. Whitt, 36 Cal.3d 724, 205 Cal. Rptr. 810 (1984). (See RB 6.) The express language of the state court opinion, itself, reveals respondent's argument is meritless. Moreover, the state court cited People v. Whitt, supra, merely as state law entirely consistent with federal law on the question of whether there was in fact a Sixth Amendment violation here, a question petitioner does not seek to challenge through certiorari.

The decision by the California Court of Appeal presents a clear cut federal question. That question is whether evidence obtained in violation of the Sixth Amendment of the Constitution, as interpreted in Massiah v. United States, supra, 377 U.S. 201, may be used for impeachment purposes. (See Appen. to Pet. A-23, A-28.)

The California Court of Appeal ruled that because respondent's statements were obtained in violation of the Sixth Amendment to the Constitution, simply and unequivocally, rather than in violation of "`only a prophylactic rule,'" (relying on an interpretation of this Court's decision in Michigan v. Harvey, supra, 494 U.S. ___, 108 L.Ed. 2d 293, 110 S.Ct. 1176), the statements were improperly admitted, notwithstanding the fact that they were used only to impeach. (Appen. to Pet. A-23, A-24, A-25.) The state court concluded that statements taken in violation of "`only a prophylactic rule'" may be used for impeachment purposes, however statements taken simply and unequivocally in violaton of the Constitution cannot be used for any purpose, including for the purpose of impeachment. (Appen. to Pet. A-23, A-24, A-28.)

In determining that respondent here was prejudiced by the admission of evidence obtained from a Massiah violation for impeachment purposes, the state court employed the harmless error test of Chapman v. California, 386 U.S. 18 (1967). (See Appen. to Pet. A-25.)

In sum, the state court opinion yields precise answers as to the grounds of its decision. There is no need, here, to resort to abstract analysis in order to determine whether there is an independent basis for the court's decision. (See, e.g., Washington v. Chrisman, 455 U.S. 1, 5, fn. 2 (1982).)

Respondent asserts that the state court, in citing People v. Whitt, supra, 36 Cal.3d 724, 741, based its decision on independent state grounds in holding that evidence seized in violation of the Sixth Amendment was not admissible for

impeachment purposes. (See RB 6.) Such an assertion is entirely baseless.

Instead, People v. Whitt, supra, was cited by the state court merely as state law entirely consistent with federal law on the question of whether there was, in fact, a Sixth Amendment violation here. (Appen. to Pet. A-17, A-20.) As pointed out in the Petition, we do not challenge the California Court of Appeal decision finding there was a violation of the Sixth Amendment to the Constitution. (See Pet. 20, fn. 5.)

Even if there were an evident state ground iterated in the opinion, which is not the case here, that would not end the inquiry. In determining whether state court references to state law constitute adequate and independent state grounds, the Court no longer conducts an independent investigation of state law or requires state courts to reconsider cases

to clarify the grounds of their decisions. (Michigan v. Long, 463 U.S. 1032, 1040 (1983).) Now, when

> "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion . . . [this Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." (Michigan v. Long, supra, 1040-1041; see also, California v. Carney, 471 U.S. 386, 389 fn. 1 (1985).)

Were the opposite true, Supreme Court review could be defeated merely by raising on the record some state law point, however inadequate or erroneous, and then suggesting that the state court may have based its decision thereon.

Accordingly, after Long, a state court wishing to look to federal law for guidance or as an alternative holding, while still relying on an independent and

adequate state ground, avoids the presumption currently employed in determining the application of the independent and adequate state ground doctrine, by stating,

> "'clearly and expressly that [it's decision] is . . . based on bona fide separate, adequate, and independent grounds.'" (Coleman v. Thompson, ___ U.S. ___, 115 L.Ed.2d 640, 59 U.S.L.W. 4789, 4792 (1991), citing Michigan v. Long, supra, 463 U.S. at 1041.)

Here, there was no explicit statement of independent grounds. Indeed, the California Court of Appeal's only reference to state law pertaining to the federal question presented on the issue of whether evidence obtained in violation of the Sixth Amendment is admissible for impeachment purposes, is People v. Harper, 228 Cal.App.3d 843, 851, 29 Cal. Rptr. 204 (1991); however, that decision, like the Court of Appeal's decision here, derived its principles by reference to federal

constitutional decisions by this Court. (People v. Harper, supra, 228 Cal.App.3d at 849-853; People v. Cribas, 231 Cal.App.3d 596, 606, 282 Cal. Rptr. 538 (1991).)

Moreover, assuming respondent's argument suggested the existence of independent state grounds, respondent has made no attempt to show the adequacy of such grounds. The mere

> "possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." (United Air Lines v. Mahin, 410 U.S. 623, 630-631 (1973); and see Orr v. Orr, 440 U.S. 268 (1979).)

Therefore, when the Court is convinced, from its own examination of the opinion, that the state court judgment rests on federal grounds, the fact that the state court

> "might have, but did not, invoke state law does not foreclose jurisdiction. . . ." (California v. Ramos, 463 U.S. 992, 997-998 fn. 7 (1983).)

Based on the foregoing, the state court decision does not rest on adequate and independent state grounds but, instead, on its face, the decision explicitly adjudicates a federal constitutional claim.

III.

RESPONDENT'S INSISTENCE THAT EVIDENCE OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT IS INADMISSIBLE FOR ALL PURPOSES, INCLUDING IMPEACHMENT, AND HIS RELIANCE ON MICHIGAN CASE LAW, DOES NOTHING MORE THAN CONFIRM THE FACT THAT THE ISSUE WARRANTS CERTIORARI REVIEW

Respondent argues that his statements, secured in violation of his right to counsel pursuant to the Sixth Amendment, were inadmissible for all purposes, including for purposes of impeachment. (RB 4.) He relies upon People v. Gonyea, 421 Mich. 462, 477-483,

365 N.W.2d 136, 143-145 (1984), a Michigan Supreme Court case. (RB 4.) Respondent's argument merely confirms that there is a conflict between lower courts on this issue.

Specifically, lower courts are divided on whether statements obtained in violation of the Sixth Amendment are admissible for impeachment. Some state and federal courts have taken the approach that a separate set of Sixth Amendment principles should apply that always results in suppression of the illegally seized evidence for impeachment. (See, e.g., United States v. Brown, 699 F.2d 585, 588-591 (2d Cir. 1983); see also, People v. Gonyea, supra, 421 Mich. 477-483, 365 N.W.2d 136, 143-145.)

However, a number of state and federal courts have decided that such evidence can in fact be introduced as impeachment evidence, just as evidence

obtained in violation of the Fourth and Fifth Amendments can be introduced and for the identical reasons. (See e.g., Martinez v. United States, 566 A.2d 1049, 1057 (D.C. App. 1989); State v. Swallow, 405 N.W.2d 29, 39-41 (S.D. 1987); State v. Thomas, 698 S.W.2d 942, 947-949 (Mo.App. 1985); People v. Ricco, 56 N.Y.2d 320, 437 N.E.2d 1097, 1100 (1982); United States v. McManaman, 606 F.2d 919, 924-925 (10th Cir. 1979); United States v. Frank, 520 F.2d 1287, 1291 (2d Cir. 1975), cert. denied, 423 U.S. 1087 (1976); People v. Bacino, 41 Ill.App.3d 738, 739, 354 N.E. 2d 641, 642 (1976); Tate v. United States, 283 F.2d 377, 379 (1960).)

Accordingly, respondent's argument merely supports a conclusion that certiorari should be granted to resolve the conflict which exists in the lower courts as to the question of whether statements obtained in violation of the

Sixth Amendment can be used for impeachment.

IV.

THIS COURT MAY INDEPENDENTLY REVIEW FACTS THAT ARE INTERMINGLED WITH LEGAL CONCLUSIONS WHEN DECIDING A SUBSTANTIAL FEDERAL QUESTION

Respondent argues his statements were not "`otherwise voluntary and trustworthy'" on their face and cites the California Court of Appeal's opinion in support of his position. On this basis, he argues the Petition should be denied. (RB 3-4, 7.)

First, whether or not the statements are voluntary and trustworthy is a question of constitutional fact bearing on a legal issue which this Court may review in entertaining a substantial federal question. Specifically, if the Court is to meet its constitutional responsibilities, it cannot permit itself to be

> "completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding." (Stein v. New York, 346 U.S. 156, 181 (1953).)

For this reason, respondent's argument alluding to a mixed question of fact and law does not defeat this Court from exercising its jurisdiction.

It is true this Court will not exercise jurisdiction merely to review a decision of a state court upon a question of fact. However, the Court may make an independent examination of facts that are intermingled with legal conclusions when necessary to decide whether a person has been deprived by a state court of a right secured by the federal Constitution. Moreover, the areas that are subject to this kind of Supreme Court assessment include findings by state courts as to the coerciveness or voluntariness of a confession. (Mincey v. Arizona, 437 U.S.

385, 398 (1978); Blackburn v. Alabama, 361 U.S. 199, 205-210 (1960); Ashcraft v. Tennessee, 322 U.S. 143, 147-148 (1944); Chambers v. Florida, 309 U.S. 227, 228-229 (1940); Haynes v. Washington, 373 U.S. 503, 515-516 (1963).)

In short, this Court will review a state court's finding of fact where a conclusion of law as to a federal right and a finding of fact may be so intermingled as to make it necessary to do so, in order to pass upon a substantial federal question. (See Fiske v. Kansas, 274 U.S. 380, 385-386 (1927); see also, Napue v. Illinios, 360 U.S. 264, 272 (1958).)

Such is the case here where any conclusions by the state court as to the coerciveness or voluntariness of the statements are necessarily intermingled in an evaluation of the federal question.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the writ of certiorari should issue to review the decision of the California Court of Appeal in this case.

Dated: March 4, 1992.

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of the State of California

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THE STATE OF CALIFORNIA,

Plaintiff,

v.

CESAR ELIAS CRIBAS,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty-one (41) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Clerk, California Supreme Court
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Hon. Richard J. Beacom, Judge
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Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California on the 9th of March 1992.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, March 9, 1992.

Arlene M. Ryan
ARLENE M. RYAN

Subscribed and sworn to before me
this 9th day of March 1992.

Anne Marie Bogard
Notary Public in and for said County and State

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No. 91-996

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

PEOPLE OF THE STATE OF CALIFORNIA PETITIONER

vs.

CESAR ELIAS CRIBAS RESPONDENT

ON WRIT OF CERTIORARI

TO THE COURT OF APPEAL FOURTH APPELLATE DISTRICT
DIVISION THREE OF THE STATE OF CALIFORNIA

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13pp

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS. i

TABLE OF AUTHORITIES ii

REQUEST TO FILE SUPPLEMENTAL BRIEF. 1

ARGUMENT

1. THE STATEMENTS WERE NOT "OTHERWISE VOLUNTARY AND TRUSTWORTHY."

2. THE JURY WAS MISINSTRUCTED TO CONSIDER THE IMPEACHING STATEMENTS AS SUBSTANTIVE EVIDENCE OF RESPONDENT'S GUILT.. 6

APPENDIX "A" CALJIC 2.13

TABLE OF AUTHORITIES

CASES

PAGE

Michigan v. Harvey 494 U.S. 344 (1990). 2

Martinez v. U.S. 566 A.2d 1049 (D.C. App. 1989.). 3

Mincey v. Arizona 437 U.S. 385 (1978). 5

New Jersey v. Portash (1979) 440 U.S. 450. 5

People v. Bacino 354 N.E.2d 641 (1976). 4

People v. Duncan (1988) 204 Cal.App.3d 613 6

People v. Wyatt (1990) 215 Cal.App.3d 255. 6

State v. Swallow 425 N.W. 2d 29 (S.D. 1987). 3

State v. Thomas 698 S.W.2d 942 (Mo. App 1985). 3

United States v. Frank 520 F2d 1287 (2nd Cir. 1975) . . . . . 4 .

United States v. McManaman 606 F.2d 919 (10th Cir. 1979). . . .4

REQUEST TO FILE SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO RULE 15.

This supplemental brief in opposition is provided to assist this Court in deciding whether to grant or deny the petition filed in this case. This Court requested a response by letter dated February 19, 1992. The response filed February 18 along with this supplemental brief in opposition sets forth respondent's position and reasoning in support of denial of the petition.

ARGUMENT

I

THE STATEMENTS OF RESPONDENT WERE NOT "OTHERWISE VOLUNTARY AND TRUSTWORTHY" ON THEIR FACE.

Every single case cited by petitioner in support of a grant of certiorari required that the impeaching statements taken in violation of a constitutionally mandated rule be otherwise trustworthy and voluntary. Respondent agrees with Argument IV in the Reply to the Brief In Opposition. The gist of that argument is that this Court may independently review facts that are mingled with legal conclusions when deciding whether or not to grant certiorari.

In this case, the facts underlying the constitutional principles involved reveal statements made by an incarcerated defendant with appointed counsel. Those statements were elicited by his accuser at the behest of the police and with a promise of help to secure his release if he affirmed the truth of her accusations.

On their face, these recorded statements cannot meet the test of voluntariness and trustworthiness which test is a condition precedent to use for <u>any</u> purpose in a trial.

In <u>Michigan v. Harvey</u> 494 U.S. 344, 351, (1990) Chief Justice Rehnquist, writing for the majority, stated "[w]e have mandated the exclusion of reliable and probative evidence for <u>all</u> purposes only when it is derived from involuntary statements." (emphasis in the

original.) This Court went on to hold that the record did not allow a determination as to the voluntariness of Harvey's waiver of his rights. There was no objection below to Harvey's statement, no record was developed in the trial court on that issue. That is not the case here.

It is submitted that, based on the extensive record developed below, the statements by respondent, given under the circumstances occurring here, are unreliable,involuntary and untrustworthy.

No case cited by petitioner, where statements were precluded from use in the government's case but allowed to impeach, comes even close to replicating the coercive situation apparent here.

In Martinez v. U.S, 566 A.2d 1049, 1057-1058 (D.C. App. 1989), the court pointed out there was "no evidence [Martinez] had retained a lawyer or that one had been appointed for him when he made his statement to the police. Nor were the statements inculpatory, a point heavily relied upon by the court, fn. 19. Finally, Martinez never contended his statements were involuntary or the result of abusive tactics, (Id. at 1058-9.) Accordingly, Martinez is inapposite and dicta re impeachment.

In State v. Swallow, 405 N.W. 2d 29, (S.D. 1987) the court stated the defendant "does not contend that he was being forced to speak to the investigator, nor does he claim that he was under any physical impairment or subjected to any psychological pressures that resulted in the confession." (Id. at p.39.) This is, once again, not the instant case.

In State v. Thomas 698 S.W.2d 942, (Mo.App. 1985), the

appellate court did not even consider that Thomas had asked for an attorney so as to cut off further questioning, thereby reducing to dicta the following discussion of whether he could be impeached with those statements.(Id. at 947.) Additionally, there was no hint that the statements were not completely voluntary.

In People v. Ricco, 437 N.E.2d 1097, (1982) the appellate court reversed Ricco's conviction since his impeachment was not accompanied by an instruction limiting the use of that impeachment to credibility only. (Id. at p. 1101.) That same defect occurred here, and was compounded by an instruction which urged the jury to consider the impeachment as substantive evidence of the crime charged. (See p. 304 of the Clerk's Transcript attached hereto and incorporated herein.) That issue is further discussed below. Ricco then, supports the respondent.

In Tate v.U.S. 283 F2d 377 (1960), no right to counsel was involved, and the statements were not inculpatory.

In People v. Bacino 354 N.E2d 641, (1976) statements taken in violation of Miranda were allowed for impeachment. The manner in which the statements were elicited does not approach the coercive nature of the statements obtained from respondent Cribas.

U. S. v. McManaman 606 F.2d 919 (10th Cir. 1979) and U.S. v. Frank, 520 F.2d 1287 (2d Cir. 1975) also involved situations were coercion and involuntariness were not a factor. The statements were otherwise trustworthy.

Accordingly, the cases cited by petitioner do not apply factually to the instant case.

Since the statements lacked trustworthiness at the outset, and coercive government misconduct was the catalyst for respondent's statements, they should not be used for any purpose and the petition for certiorari should be denied. (New Jersey v. Portash, 440 U.S. 450 (1979); Mincey v. Arizona, 437 U.S. 385, (1978).

II

THE JURY WAS MISINSTRUCTED TO CONSIDER THE IMPEACHING STATEMENTS AS SUBSTANTIVE EVIDENCE OF RESPONDENT'S GUILT.

Over one year before the respondent's trial, a Court of Appeal for the state of California held that it was reversible error to fail to instruct a jury sua sponte that statements gained in violation of Miranda and used to impeach a testifying defendant could be used only to assess credibility and could not be used as substantive evidence of guilt. (People v. Duncan (1988) 204 Cal.App.3d 613, 617-22.)

In the instant case, the same error was made and additionally exacerbated by the giving of an erroneous instruction that the illegally gained statements could be used as substantive evidence of guilt. (CT 304, attached and RT 381.)

This error was not brought to any court's attention until now as it went undetected and respondent's conviction was reversed in any event. Counsel found the error by researching cases which noted a limiting instruction was required and then checking the record and finding the wrong instruction was given here. It is true that a subsequent California case has held that such a limiting instruction need not be given sua sponte however there was apparently no erroneous instruction given in that case affirmatively allowing substantive use as occurred here. (cf. People v. Wyatt (1990) 215 Cal.App.3d 255.)

In any event, federal cases have found the lack of such a limiting instruction reversible error. (Hinman v. McCarthy (9th Cir. 1982) 676 F.2d 343.) In Oregon v. Hass (1975) 420 U.S. 714, this Court noted that the jury was instructed to consider defendant's statements, used for impeachment after a Miranda violation, only as to credibility and not guilt.(Id. at p. 717.)

Accordingly, this error illustrates that even if impeachment could have been properly done, it was not.

Because of this error and the use of involuntary and untrustworthy statements, and the reasons set forth in the Brief in Opposition, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Charles R. Khoury Jr

Attorney for Respondent Cribas

APPENDIX "A"

CALJIC 2.13 (5TH EDITION)

PRIOR CONSISTENT OR INCONSISTENT STATEMENTS AS EVIDENCE

Evidence that on some former occasion, a witness made a statement or statements that were inconsistent [or consistent] with [his] [her] testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on such former occasion.

[If you disbelieve a witness' testimony that [he] [she] no longer remembers a certain event, such testimony is inconsistent with a prior statement or statements by [him] [her] describing that event.]

BEST AVAILABLE COPY

Charles R. Khoury Jr.
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CASE NUMBER: 91-996

DECLARATION OF SERVICE

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of Hillsborough N.H. in which the mailing occurred and am not a party to the subject cause. My business address is P.O. Box 1066 Wilton, New Hampshire. I served the SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI as follows: Original and eleven copies to the Hon. William K. Suter, Clerk of the Supreme Court of the United States, One First Street NE, Washington D.C. 20543 of which a true and correct copy of that document was mailed to each addressee in a separate envelope named as follows:

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I declare under penalty of perjury the above statement is true.
Executed at Wilton N.H. on March 18, 1992.

Charles R. Khoury Jr.